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Circuit Court of Appeals

For the Ninth Circuit. /

NORWICH UNION FIRE INSURANCE SOCIETY, LIMITED, of Norwich and London, England, a Corporation,

Plaintiff in Error,

vs.

LEO BROTHERS COMPANY, a Corporation,
Defendant in Error,

and

THE NEW BRUNSWICK FIRE INSURANCE COMPANY, a Corporation,

Plaintiff in Error,

vs.

LEO BROTHERS COMPANY, a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writs of Error to the United States District Court
of the District of Idaho, Central Division.

FILED

DEC 6 - 1923

P. D. MONKTON,

CLERK

United States
Circuit Court of Appeals

For the Ninth Circuit.

NORWICH UNION FIRE INSURANCE SO-
CIETY, LIMITED, of Norwich and London,
England, a Corporation,

Plaintiff in Error,

vs.

LEO BROTHERS COMPANY, a Corporation,
Defendant in Error,
and

THE NEW BRUNSWICK FIRE INSURANCE
COMPANY, a Corporation,

Plaintiff in Error,

vs.

LEO BROTHERS COMPANY, a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writs of Error to the United States District Court
of the District of Idaho, Central Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the Second Judicial District of the State of Idaho, in and for Latah County.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

NORWICH UNION FIRE INSURANCE SOCIETY, LIMITED, of Norwich and London, England, a Corporation,
Defendant.

Complaint.

Comes now the above-named plaintiff and for cause of action against the defendant, alleges:

I.

That at all the times herein mentioned the plaintiff has been and now is a corporation organized under the laws of the State of Idaho with its principal place of business and head office in Moscow, Latah County, Idaho, and has been and now is engaged in the operation of a cider and vinegar plant and has been and now is manufacturing cider and vinegar, at Moscow, Idaho.

II.

That at all the times herein mentioned the defendant has been and now is a corporation organized under the laws of England, with its principal place of business and head office in Norwich, England, and has been and now is engaged in the general fire insurance business and has been and now is authorized to conduct its said business in the

United States and plaintiff is informed and believes and upon such information and belief alleges the truth to be that the defendant has complied with all the laws of the State of Idaho regarding foreign corporations and fire insurance companies doing business in the State of Idaho and has been and now is authorized to conduct and carry on its said business within the State of Idaho, and to make and enter into contracts of indemnity against loss by fire and issue and [1*] deliver fire insurance policies in conformity with and agreeable to the laws of the State of Idaho.

III.

That at all times herein mentioned, Fred Veatch and M. J. Veatch have been and now are copartners doing business at Moscow, Latah County, Idaho, under the name and style of Veatch Realty Co., and that said copartnership has been and now is engaged in the business of writing fire insurance.

IV.

That during all the times herein mentioned, the said Veatch Realty Co., has been and now is the duly appointed and authorized agent of the defendant at Moscow, Latah County, Idaho, and is authorized as such agent to make, issue and deliver to patrons of defendant its policies of insurance, indemnifying against loss by fire.

V.

That the buildings and premises in which plaintiff has been and now is conducting and carrying on

*Page-number appearing at foot of page of original certified Transcript of Record

its said business are located at the southeast corner of the intersection of Main and C Streets, in Moscow, Idaho, and that upon the 21st day of December, 1920, and while plaintiff was the owner of said building and the contents thereof, the defendant acting by its duly authorized agent, Veatch Realty Co., did, upon the consideration of the stipulations therein named, and of \$225.00 premium thereon, make, execute and deliver to the plaintiff its policy of insurance, No. 1064, whereby it, the defendant, did insure plaintiff, for the term of one year from the 21st day of December, 1920, at noon, to the 21st day of December, 1921, at noon, against any direct loss of merchandise of every description, consisting principally of vinegar and vinegar stock, or any damage thereto, by fire, in an amount not exceeding \$5,000.00, while contained in said building, and which said building is described in said policy of insurance as located at No. 244 on the east side of Main Street, between "A" and "C" Streets, in Moscow, Idaho, and as being located in Block 102, [2] No. 244, according to Sanborn's Fire Insurance Map of Moscow, Idaho, and that said building was described in said policy of insurance as a three story composition roof, brick and frame building and its additions of like construction communicating and in contact therewith. That a true and correct copy of said policy of insurance is hereunto attached and made a part hereof and plaintiff asks that in all proceedings herein said policy of insurance may be read and all its terms and conditions be considered with the same force and effect, as if

the legal effect thereof were pleaded herein by affirmative allegations.

VI.

That said policy of insurance so executed and delivered to the plaintiff permitted other concurrent insurance upon said building, and the contents thereof, and defendant did thereby promise and agree that in the event of the direct loss of or damage to said merchandise while contained in said building, by fire, it would pay plaintiff its share or portion thereof.

VII.

That long prior to July 6th, 1921, plaintiff paid to defendant and defendant has accepted and received from plaintiff the said consideration for said policy of insurance, to wit, the sum of \$225.00 the premium thereon.

VIII.

That after the issuance and delivery of said policy of insurance to plaintiff, as above set forth, and on or about the 6th day of July, 1921, and while plaintiff was the owner thereof, said building was partially destroyed, and the merchandise contained therein, consisting principally of vinegar and vinegar stock, was wholly destroyed by fire, for the origin of which plaintiff was in no way or manner responsible, and that when so destroyed by fire there was other concurrent insurance upon said merchandise under certain policies of insurance issued by other insurance companies in the amount of \$26,000.00, and that plaintiff's loss upon said merchandise by said fire amounted to \$31,000.00

and that the amount thereof for which the defendant became and now [3] is liable to and is now owing plaintiff under its said policy of insurance No. 1064, is \$5,000.00.

IX.

That upon the occurrence of said fire the plaintiff gave the defendant immediate notice of the loss thereby in writing and within sixty days after the fire, rendered a statement to the defendant, signed and sworn to by plaintiff, stating the knowledge and belief of plaintiff as to the time and origin of said fire, the interest of plaintiff in the property and the amount of loss thereon, all other insurance covering said merchandise or any part thereof, and a copy of all the descriptions and schedules in all policies thereon, by whom and for what purpose the said building and the several parts thereof were occupied at the time of said fire and complied with all the terms and conditions in said policy of insurance contained by it to be kept and performed in case of a loss thereof, or injury thereto by fire.

X.

That it is provided in said policy of insurance that the sum for which defendant is liable pursuant to said policy, shall be payable sixty days after due notice and proof of loss; that this plaintiff gave said notice required by the terms of said policy and made said proof of loss and delivered the same to the defendant on the 29th day of August, 1921, and more than sixty days have elapsed since making said proof of loss as required by the terms of said policy, and that the defendant has not paid its said loss to the plaintiff, or any part or portion thereof.

XI.

That by reason of the premises plaintiff alleges that the defendant is indebted to the plaintiff in the sum of \$5,000.00 with interest thereon from October, 29th, 1921, at the rate of 7% per annum, no part of which has been paid.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of \$5,000.00, with interest thereon from and after the [4] 29th day of October, 1921, until the entry of judgment herein, at the rate of seven per cent per annum, and for its costs and disbursements herein sustained.

FRANK L. MOORE,
Attorney for Plaintiff, Residing at Moscow, Idaho.
(Duly verified.) [5]

Exhibit "A."

No. 1064

Standard Fire
Insurance Policy
Stock Company

Amount, \$5000.00

Term, 1—year.

Rate, 250

Premium, \$225.00

Founded 1797

NORWICH UNION

FIRE

INSURANCE SOCIETY LIMITED,

of Norwich and London, England.

Pacific Coast Department.

San Francisco, California.

IN CONSIDERATION of the stipulations herein
named and of Two Hundred Twenty-five and

No/100 DOLLARS PREMIUM, Does insure LEO BROTHERS COMPANY, for the term of One Year from the 21st day of December, 1920, at noon, to the 21st day of December, 1921, at noon, against all direct loss or damage by fire except as hereinafter provided, to an amount not exceeding FIVE THOUSAND AND NO/100 Dollars, to the following described property while located and contained as described herein and not elsewhere, to wit:

Standard Forms Bureau Form 367 (May 1918)
MERCHANDISE AND FIXTURES FORM.

On the following described property, all situate at No. 244 on the East side of Main Street, between "A" and "C" Streets, in Moscow, Idaho.

*1 \$5000.00 On merchandise of every description, consisting principally of Vinegar & Vinegar stock manufactured or in process of manufacture, and on materials for manufacturing same, including packages, labels, cases, boxes and all wrapping and packing materials, being the property of insured or sold but not removed; and (PROVIDED the insured shall be liable by law for loss or damage thereto or shall have specifically assumed liability therefor), this insurance shall also cover merchandise held in trust, or in commission, or left for storage or repairs; all only while contained in the three story comp.

roof, brick & frame building and its additions (if any) of like construction communicating and in contact therewith, situate as above.

*2 \$Nil On store, office and workshop furniture and fixtures and equipment, and on awnings, implements, signs and tools; and on supplies incidental to the business of insured not described under Item 1 above; all only while contained in, on or attached to above described building and its additions (if any) of like construction communicating and in contact therewith. [6]

*3 \$Nil On

*4 \$Nil On

*No insurance attaches under any of the above items unless a certain amount is specified and inserted in the blank immediately preceding the item.

Loss or damage for which insured shall be liable by law, or for which insured shall have specifically assumed liability, under item 1 above, shall be adjusted with and payable to the insured named in this policy.

“RESTRICTION IN CASE OF SPECIFIC INSURANCE.” No article or piece of personal property separately insured for a specific amount under this, or any other policy, is covered by this policy except for such specific amount, if any,

named herein; nor shall this company be liable for loss to merchandise of others for which the insured is liable by law or shall have specifically assumed in this policy.

“SIDEWALK CLAUSE.” It is understood that property above described is also covered under its respective items, on sidewalks, platforms and alleyways pertaining to above described building, only while in daily transit to and from said building.

Other insurance permitted.

The Provisions Printed on the Back of This Form are Hereby Referred to and Made a Part Hereof.

Attached to Policy No. 1064 of the Norwich Union Fire Ins. Co. Agency—Moscow, Idaho.

Dated December 21, 1920.

Insurance Map

Sheet 4

Block 102

VEATCH REALTY CO.,

No. 244

Agent.

For other provisions see reverse side of this rider.

PROVISIONS REFERRED TO IN AND MADE
PART OF THIS RIDER (No. 367).

“PERMITS.” Permission granted to make alteration or repairs to the above described building without limit of time, and to build additions, and if of like construction and communicating and in contact therewith, this policy shall cover in same under its respective items; permission also granted to do such work in said building as the nature of the

occupancy may require; to work at any and all times; and, when not in violation of law or ordinance, to generate illuminating gas or vapor, and to keep and use of the necessary quantities of all articles, things and materials incidental to the business conducted therein and for the operation of said building, it being warranted by insured that no artificial light (other than incandescent electric light) be permitted in the room when the reservoir of any machine or device using petroleum or any of its products of greater inflammability than kerosene oil is being filled or drawn on. A breach of this warranty suspends this insurance during such breach. But notwithstanding anything herein contained, the use, keeping, allowing, or storing on the within described premises of dynamite, fireworks, Greek fire, gunpowder in excess of fifty pounds, nitro glycerine or other explosives is prohibited and shall wholly suspend this policy during the period such use, keeping, allowing or storing shall continue unless a specific permit therefor is attached to this policy.

“LIGHTNING CLAUSE.” This policy shall cover any direct loss or damage by lightning (meaning thereby the commonly accepted [7] use of the term “lightning” and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy; Provided, however, that if there shall be any other insurance on said property, this company shall be

liable only *pro rata* with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

“ELECTRICAL EXEMPTION CLAUSE.” If dynamos, wiring, lamps, motors, switches or other electrical appliances or devices are insured by this policy, this insurance shall not cover any immediate loss or damage to dynamos, exciters, lamps, motors, switches, or any other apparatus for generating, utilizing, testing, regulating, or distributing electricity, caused directly by electric currents therein, whether artificial or natural.

THIS POLICY IS MADE AND ACCEPTED subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on the back hereof, which are hereby specially referred to and made a part of this policy, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto; and no officer, agent, or other representative of this Society shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto; and as to such provisions and conditions, no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

Provisions as required by law to be stated in this Policy. This policy is in a stock corporation.

IN WITNESS WHEREOF, this Society has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized Agent of the Society at Moscow, Idaho, 1045.

NORWICH UNION FIRE INSURANCE
SOCIETY, LTD.,

By: their Attorney: J. L. FULLER,
Manager of the Pacific Coast Dept.

COUNTERSIGNED at Moscow, Idaho, this 21st
day of December, A. D. 1920.

VEATCH REALTY CO.,
Agent. [8]

This society shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused; and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this society, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of the loss have been received by this company in accordance with the terms of this pol-

icy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged, with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof whether before or after a loss.

This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time;

or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple, or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naptha, nitro-glycerine or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States Standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended

for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.
[9]

This society shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This society shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any

greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If any application, survey, plan, or description, of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be cancelled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the *pro rata* premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest

of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; or removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not. [10]

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company,

signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any persons named by this company and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated

by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This society shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This society shall not be liable under this policy for a greater portion of any loss on the described property, or for loss by and expenses of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent in-

surers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for reinsurance shall be as specifically agreed hereon. [11]

If this society shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this society shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this society by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be

written or printed upon, attached, or appended hereto.

[Endorsed]:

Moscow, Idaho, 21st December, '20.

STANDARD FIRE INSURANCE POLICY.

No. 1064.

Expires Dec. 21, 1921.

Location Vinegar & Vinegar Stock.

Amount \$5000.00. Premium \$225.00.

Rate 250.

Name of Insured:

LEO BROTHERS COMPANY.

NORWICH UNION FIRE INSURANCE SO-
CIETY LIMITED.

U. S. District Court, District of Idaho. Filed
Jan. 28, 1922. W. D. McReynolds, Clerk. [12]

In the United States District Court for the District
of Idaho, Central Division.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

NORWICH UNION FIRE INSURANCE SO-
CIETY, LIMITED, of Norwich and London,
England, a Corporation,
Defendant.

Stipulation Waiving Jury.

It is hereby agreed and stipulated by and between the parties hereto, through their attorneys of records, that the issues of fact in the above-entitled cause may be tried and determined by the Court without the intervention of a jury, the parties hereto hereby waiving a jury.

Dated this 19th day of May, 1922.

FRANK L. MOORE,

Attorneys for Plaintiff.

WM. E. LEE,

E. EUGENE DAVIS,

Attorneys for Defendant.

U. S. District Court, District of Idaho. Filed
May 19, 1922. W. D. McReynolds, Clerk. [13]

In the District Court of the United States for the
District of Idaho, Central Division.

No. 784.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

NORWICH UNION FIRE INSURANCE SO-
CIETY, LTD., of Norwich and London, Eng-
land, a Corporation,

Defendant.

No. 785.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

THE NEW BRUNSWICK FIRE INSURANCE
COMPANY, a Corporation,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that the above-entitled cause came on for trial before the Honorable Frank S. Dietrich, Judge of the above-entitled court, sitting without a jury, a stipulation in writing signed by counsel for both parties having been filed in said cause prior to the trial, at 9:45 A. M. May 19, 1922, plaintiff appearing by its counsel Frank Moore and defendants appearing by their counsel E. Eugene Davis and Wm. E. Lee, whereupon the following proceedings were had and no others, to wit: [14]

The COURT.—These cases that you are bringing on for trial today are law actions as I understand it.

Mr. DAVIS.—Yes, your Honor.

The COURT.—Have you filed a written stipulation waiving jury trial?

Mr. DAVIS.—We have just filed it, your Honor.

The COURT.—Very well.

Mr. MOORE.—Now, Mr. Lee, or Mr. Davis, have we prepared all of our preliminary matters, to get the case started now for trial?

Mr. DAVIS.—I would like, your Honor, to propose amendment to my answer. I will state the reason to the Court. I was under the impression that the amount in controversy was agreed upon and that there would be no necessity for offering evidence or proof as to that but inasmuch as it is not, I will have to amend my answer slightly, so as to bring that point within the issue as it will be raised, if I may, your Honor. May I make this in one affirmative defense, your Honor, to quote these? They are identical. Or shall I submit it in two separate affirmative defenses? Maybe I might do this: File an affirmative answer later, and just state the substance.

The COURT.—I think you would better do that. State your position now, so that counsel will know what it is.

Mr. DAVIS.—My position is simply this, your Honor: The policies provide for a *pro ratio* of all insurance. In view of the fact that I thought we could stipulate that if plaintiff was entitled to recover at all he was entitled to recover such and such a sum from each company, I didn't plead that *pro ratio*; but my pleading will be to this effect,—that if these two policies, the Norwich Union and the New [15] Brunswick, are held to cover on this property that was destroyed, that there then will have been a total of \$31,000 insurance covering this property, and that the Norwich Union, with \$5000 insurance, would be liable for only five-thirty-firsts of any loss, and that the New Brunswick, with

\$6000, would be liable for six-thirty-firsts of all loss. That will not be denied, Mr. Moore.

Mr. MOORE.—Well, I don't remember now just exactly the figures. I thought the loss was higher than that. It would certainly be more than five-thirty-firsts of \$5000.

Mr. DAVIS.—No. Five thirty-firsts of the loss. If the loss was around \$19,000, we would be liable for five thirty-firsts of the \$19,000, for the Norwich Union, and six thirty-firsts of the loss,—or whatever the loss is proved to be.

Mr. MOORE.—The portion was higher than that.

Mr. DAVIS.—Not the loss—the insurance. That would be correct, would it, Mr. Veatch, if these policies are held to cover all?

(Mr. Veatch indicated affirmatively by a nod of his head.)

Mr. DAVIS.—Now, can we get together on these figures here?

Mr. MOORE.—Well, I don't know. We haven't been able to yet.

Mr. DAVIS.—I don't know whether you understand our position or we understand yours. It is going to be quite a task to put in all of this account, your Honor. It will be at least a half day's job, your Honor, unless we can agree. It has been agreed on on all the other policies, I understand. Would your Honor mind taking a few minutes time to let us talk it over?

The COURT.—No. [16]

(A short recess was thereupon taken.)

Mr. MOORE.—If your Honor please, it is stipulated and agreed that these two causes, Leo Brothers Company, a corporation, plaintiff, vs. The Norwich Union Fire Insurance Society, Limited, of Norwich and London, England, a corporation, defendant, No. 784, and the case of Leo Brothers Company, a corporation, plaintiff, vs. The New Brunswick Fire Insurance Company, a corporation, defendant, may be consolidated for the purpose of trial and all future proceedings in this court, and any proceedings in the upper court that either party may take. Is that satisfactory?

Mr. DAVIS.—If we can so stipulate here.

The COURT.—Very well.

Mr. MOORE.—It is further agreed between the plaintiff and defendants, through their respective counsel, that the allegations contained in paragraphs one of each complaint will be taken as confessed, and no proof thereon need be made.

Also that the allegations in paragraph two of each complaint will be taken as confessed and no proof thereof is to be made.

And the remainder of the allegations in the several complaints are to be proven.

Now, very briefly stated, the plaintiff is engaged in the business of manufacturing vinegar, in Moscow, Latah County, Idaho, and has a plant, which it insured, together with the product of its factory. In the case against the Norwich Union Fire Insurance Society, we have alleged that on the 21st day of December, 1920, the defendant insurance company issued its policy of insurance or indemnity

against loss by fire, No. 1064, whereby it did indemnify the plaintiff in the [17] sum of \$5000, on the following described property, all situate at No. 244 on the east side of Main Street between A and C Streets, in Moscow, Idaho: On merchandise of every description, consisting principally of vinegar and vinegar stock manufactured or in process of manufacture, and on materials for manufacturing the same, including packages, labels, cases, boxes, and all wrapping and packing material, being the property of the insured, or sold, but not removed; and (provided the insured shall be liable by law for loss or damage thereto or shall have specifically assumed liability therefor), this insurance shall also cover merchandise held in trust or on commission or left for storage or repairs; all only while contained in the three-story comp. roof, brick and frame building and its additions (if any) of like construction communicating and in contact therewith, situate as above. On the 6th day of July, 1921, a fire occurred, damaging a quantity of merchandise, vinegar, that was contained in this building. The loss was approximately \$31,000. The insurance amounted to approximately \$31,000, and we are suing this company for the face of its policy and interest. We have alleged that we complied with the terms of the policy by immediately notifying the company of the loss and by making the proofs required under the provisions and terms of the policy. That sixty days elapsed after the making of proof, and the

defendant denied liability or refused to pay, and we are suing for that amount.

Now the other cause of action, against the other company, is practically the same, except as to the dates of the insurance and the amount, which I think is \$6000. I think that is all I care to state so far as the facts are concerned, at this time. [18]

Mr. DAVIS.—Would your Honor like to have me state our position at this time? The substance of Mr. Moore's statement is correct. We expect, however, to prove that the building that was destroyed was insured as a separate risk, and was in fact and in contemplation of the parties at the time of the contract, a separate building, and was insured under separate policies, and was not the building insured under the policies covered by these two companies. That is the substance of our defense and we will offer proof to that effect.

The COURT.—You mean that the loss does not fall within the terms of the policy?

Mr. DAVIS.—Does not fall within the terms of the policy. There are two buildings up there; there is the vinegar factory, which is on the south-east corner of Main and C. Fifteen feet south of that is another building, a wooden structure, in which the tanks and vinegar were stored. We will show that, through the course of writing this insurance, that these risks were separately insured and treated throughout as separate risks. The wooden building to the south of the factory was the building that burned. Upon that building was \$20,000 specific insurance, in two other com-

panies, other than this company. That the risk was described specifically in those policies and those companies paid. That 244, which is the building described in this policy, was not touched by fire, except a very minor damage, which I do not think they are claiming for.

Mr. MOORE.—I will say further that we are suing to recover insurance or indemnity for loss of merchandise, and not the building, in these two actions, merchandise and cider vinegar, we are suing for. Mr. Veatch, will you take the stand.

The COURT.—Well just the merchandise—you are not suing [19] for damage to the building at all?

Mr. MOORE.—No.

Mr. DAVIS.—Just the vinegar and contents of the building.

The COURT.—Very well.

Testimony of Fred Veatch, for Plaintiff.

FRED VEATCH, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. MOORE.)

Q. State your full name, Mr. Veatch.

A. Fred Veatch.

Q. And where do you reside?

A. Moscow, Idaho.

Q. And how long have you been a resident of Moscow, Idaho? A. Since September, 1889.

(Testimony of Fred Veatch.)

Q. Have you an acquaintanceship with a copartnership known as Veatch Realty Company?

A. I have.

Q. Who composes that partnership, if you know?

A. Fred Veatch and M. J. Veatch.

Q. Fred Veatch is yourself? A. Yes, sir.

Q. What is the Veatch Realty Company engaged in, what business, at this time?

A. The writing of insurance and bonds.

Q. And how long has the company been engaged in that class of business?

A. The Veatch Realty Company I think is about fourteen years old; it was formed about fourteen years ago; but the [20] firm of Spotswood & Veatch has been in business here since 1889.

Q. Just the Veatch Realty Company?

A. I think about fourteen years ago.

Q. Is the Veatch Realty Company the successor of Spotswood & Veatch?

A. Yes, sir, it is.

Q. Has the partnership of Veatch Realty Company had any business relations with the Norwich Union of London, England? A. Yes, sir.

Q. What was that relationship?

A. I have been their agent for the writing of fire insurance for Moscow and vicinity for at least fourteen years,—the Veatch Realty Company,—and much longer than that as Spotswood & Veatch.

Q. Has the copartnership of Veatch Realty Company had any business relationship with the New

(Testimony of Fred Veatch.)

Brunswick Fire Insurance Company, a corporation? A. Yes, sir. We are their agents.

Q. What was the nature of that business?

A. We are their agents for the writing of fire insurance for Moscow and vicinity, and I think for about six years we were their agents.

Q. Have you any knowledge of a corporation known as the Leo Brothers Company?

A. I have.

Q. Where has it been doing business?

A. In Moscow.

Q. What is the business of Leo Brothers Company?

A. The manufacture of apple cider vinegar. [21]

Q. Where? A. At Moscow.

Q. Does it own and operate a plant for that purpose? A. Yes, sir.

Q. And where is the plant situated?

A. It is situated on the east side of Main Street, between A and C, or on the southeast corner of C and Main Streets.

Q. How long, if you know, has the Leo Brothers Company, a corporation, owned the premises and the plant where it is now conducting its business?

A. Since 1913, I think, some time in that year.

Q. Was it the owner of the premises then on the 21st day of December 1920? A. Yes, sir.

Q. Has it been the owner of the premises at all times since that date? A. Yes, sir.

Q. Now, upon the 21st day of December, 1920, tell us whether or not Veatch Realty Company

(Testimony of Fred Veatch.)

issued any policy of insurance in the name of the Norwich Union Fire Insurance Society, Limited, of Norwich and London, upon any of the property of the plaintiff, Leo Brothers Company?

A. They did.

Q. Have you that policy with you? A. Yes, sir.

Q. Will you produce it?

(Witness produced paper.)

Mr. MOORE.—We ask that the instrument offered be marked Plaintiff's Exhibit "A" for identification. [22]

The CLERK.—I will number it, unless you object.

Mr. MOORE.—All right. One, is it?

The CLERK.—Yes.

Said paper (Norwich Union fire insurance policy) was marked Plaintiff's Ex. 1.

Mr. MOORE.—Plaintiff's Exhibit No. 1, for identification. We now offer the same in evidence.

Mr. DAVIS.—I have no objection, except that it is immaterial.

The COURT.—Very well. It may go in.

Mr. MOORE.—Will you waive the reading of it at this time?

Mr. DAVIS.—Yes.

Mr. MOORE.—Q. Now, Mr. Veatch, tell us whether or not, on or about the 28th day of July, 1920, the copartnership of Veatch Realty Company wrote any insurance, any policy of insurance, upon any property of Leo Brothers Company, a corpora-

(Testimony of Fred Veatch.)

tion, for the defendant, The New Brunswick Fire Insurance Company, a corporation?

A. We did.

Q. Have you that policy in your possession?

A. Yes, sir. I brought the wrong policy over. I will have the other one here in just a second.

Mr. MOORE.—The witness advises me that he brought the wrong policy.

Mr. DAVIS.—I would like to have him bring the policy, so that we can compare it. I won't require them to formally offer it.

Mr. MOORE.—If the Court please, I desire to amend the complaint in the case of Leo Brothers Company, a corporation, plaintiff, vs. Norwich Union Fire Insurance Society, Limited, of Norwich and London, England, a corporation, in paragraph 7, in line three thereof, by erasing the figures 225 and inserting in [23] lieu thereof the figures 125.

Mr. DAVIS.—If that is correct I have no objection.

Mr. MOORE. — Q. Now, I can't recall, Mr. Veatch—

Do you know, Mr. Davis, whether that amount appears in the complaint further?

Mr. DAVIS.—I don't believe so.

Mr. MOORE.—Let the amendment go to all corrections of that amount.

Mr. LEE.—The answer could also be amended in the same respect too?

(Testimony of Fred Veatch.)

Mr. MOORE.—Yes.

The COURT.—Is this amount admitted in the answer?

Mr. LEE.—Well, we just specifically deny that it amounts to 225, is all.

Mr. DAVIS.—We admit that he paid the premium for this particular policy, your Honor, so he won't have to prove that.

Mr. MOORE.—Do you want me to introduce proof on that?

Mr. DAVIS.—No. This Norwich Union policy was paid for, but it doesn't cover this particular building that was burned.

Mr. MOORE.—Will you then turn to paragraph 7 of the complaint?

Mr. DAVIS.—That may be admitted as it stands, Mr. Moore.

Mr. MOORE.—It is stipulated, then, that the allegations of paragraph 7 in each complaint are confessed as alleged and no proof thereof is necessary.

Q. Now, Mr. Veatch, do you know whether or not a fire occurred in or upon the property of the Leo Brothers corporation, the plaintiff?

A. It did, yes, sir.

Q. At what time, if you remember? [24]

A. On the evening of July 6, 1921.

Q. Was that the property covered by these two insurance policies? A. Yes, sir.

Mr. DAVIS.—I object to that, your Honor. That calls for a conclusion.

(Testimony of Fred Veatch.)

The COURT.—Sustained.

Mr. MOORE.—Q. Where was the property in which the fire occurred situated?

A. On the southeast corner of Main and C Streets.

Q. That is the southeast corner of the intersection of Main and C. Streets?

A. Main and C Streets, yes, sir.

Q. And on the east side of Main Street between what streets? A. Between A and C.

Q. Did the Leo Brothers sustain any loss by that fire? A. Yes, sir, they did.

Q. What, if anything, did Leo Brothers do with reference to notifying the defendants in this action of that loss?

Mr. DAVIS.—We will admit that the defendants were duly notified, your Honor.

The COURT.—In both cases?

Mr. DAVIS.—In both cases.

The COURT.—Very well.

Mr. MOORE.—Q. Mr. Veatch, can you tell us what that loss amounted to? A. On the entire—

Q. No,—on this property that is covered by the insurance. We didn't read the description of the property insured, but it is merchandise, principally cider vinegar. It may be assumed that nothing but the vinegar was affected by this insurance. [25]

Mr. DAVIS.—With the further objection that nothing destroyed at all was affected.

Mr. MOORE.—Well, with that reservation.

The COURT.—I notice in these policies, a part of the description is the number, 244.

(Testimony of Fred Veatch.)

Mr. MOORE.—Yes.

The COURT.—Are you going to elucidate—what is 244?

Mr. MOORE.—A number, I understand, fixed by—I don't know what his official position is, or what connection he has with the company, but it is the man who, I guess, prepared, alters, and changes as needed the Sanborn Fire Map of Moscow.

The COURT.—Oh, it is a reference to his fire map?

Mr. LEE.—Yes.

Mr. MOORE.—Q. Do you know what the number of Leo Brothers Company's plant is—do you know what street it is numbered on?

A. On Main. It is numbered on both Main and A Streets, as far as the Sanborn map is concerned.

Q. Main and A Streets?

A. Main and C Streets, yes.

Q. But what is the city number?

A. I don't know that it has a city number, Mr. Moore. I only know the Sanborn map number on that, is our only reference, and that is number 244.

Mr. MOORE.—We have received the policy of the New Brunswick Fire Insurance Company, and we ask that it be marked for identification as Plaintiff's Exhibit No. 2.

Said insurance policy was marked Plaintiff's Exhibit No. 2.

Mr. MOORE.—We now offer it in evidence.

Mr. DAVIS.—I have no objection, Mr. Moore, if it compares up with the—we have never seen it, is all. We would like [26] to look it over a

(Testimony of Fred Veatch.)

second. There is just a slight discrepancy here, Mr. Moore, in these daily reports, but I will make no objection at the present time other than that it is immaterial, and ask Mr. Veatch to explain these discrepancies.

Mr. MOORE.—You waive the reading at this time?

Mr. DAVIS.—Yes.

Mr. MOORE.—Q. Do you write your insurance descriptions in the city of Moscow by a map known as the Sanborn Fire Map of the city of Moscow?

A. Entirely so, yes, sir.

Q. Were the descriptions in the two policies of these two defendants in evidence so written?

A. They were.

Q. Have you in your possession a Sanborn Fire Map of the city of Moscow, showing the location and the description of the property of Leo Brothers? A. I have, yes, sir.

Q. Is this Sanborn's Fire Insurance Map of the city of Moscow that you refer to?

A. Yes, sir.

Q. Were these two policies written according to the descriptions in this map?

Mr. DAVIS.—I object to that, your Honor. He can say with reference to these descriptions, if that is what he means, but according—

Mr. MOORE.—We will admit the technicality and say “with reference.”

The COURT.—You may answer the question. Were they written with reference to these maps?

(Testimony of Fred Veatch.)

A. They were, both of them. [27]

Said map was thereupon marked Plaintiff's Exhibit No. 3.

Q. Will you turn to the page of Plaintiff's Exhibit No. 3 where the description of the Leo Brothers' property which you say these insurance policies covered is described.

A. It is right here.

Q. What page is it?

A. Page 4. It is located on this map as Page 4, Block 102, No. 244.

Mr. MOORE.—We now ask that page 4 of this map be marked for identification.

Mr. DAVIS.—I have no objection.

Said page 4 of said map was marked as Plaintiff's Exhibit No. 3-A.

Mr. MOORE.—We offer it in evidence.

Mr. DAVIS.—What map is that?

WITNESS.—That is the 1918.

Mr. MOORE.—Do you want the witness to point out on this map where that property is situated?

The COURT.—Have you introduced it in evidence?

Mr. MOORE.—Yes.

The COURT.—Very well.

Mr. MOORE.—Now, will you point out, for the benefit of the Court, where Leo Brothers' property is situated. Where is Main Street, first?

A. Here is Main Street, shown on this map. This is going north from the business part of town.

Q. Where is A Street?

(Testimony of Fred Veatch.)

A. A Street is on the south side.

Mr. DAVIS.—North.

WITNESS.—This is north right here. This is east. This is north. Now that— [28]

Mr. MOORE.—Q. Where is “A” Street?

A. “A” Street is right here on the south.

Q. Where is “C” Street?

A. “C” Street is right here on the north.

Q. Now, point out the property owned by the Leo Brothers Company.

A. This property indicated inside of this line, except we are built right up to the line there and back to the alley. Our buildings practically cover all of our holdings in there.

Q. This exhibit was used in the trial of another cause, was it not? A. Yes, sir.

Q. And those pencil and ink markings were made upon it at that time? A. Yes.

Q. Now, where was the merchandise, the cider vinegar, located, when the loss occurred?

A. In this location right here.

Q. And what is that called upon the—marked upon the map?

A. That is marked “Vinegar sheds.”

The COURT.—“Vinegar tanks,” you mean?

A. “Vinegar tanks,” yes.

Mr. MOORE.—Q. And what was the vinegar contained in? A. Large tanks.

Q. How many of them? A. Twelve, 16x16.

Q. Do you know how many gallons of vinegar were lost at that time?

(Testimony of Fred Veatch.)

A. Approximately 130,000 gallons; it was a hundred and twenty-nine thousand, and, I think, six hundred and fifty, to be exact. [29]

The COURT.—Where is the number 244?

A. Right there, Judge. Here is the number right there.

The COURT.—The fire started on the property numbered two hundred and what?

A. 224. That was the old place used by the highway district at that time.

Mr. MOORE.—Q. It was an old barn, but it didn't belong to Leo Brothers? A. No.

Q. The fire communicated from that barn over to the property of Leo Brothers? A. Yes.

Q. Can you tell us whether or not there was any other concurrent insurance upon this vinegar, this personal property?

A. There was \$31,000 on vinegar.

Q. That is in all?

A. That was in all. And then there was—

Q. This policy is for \$6,000. I may get mixed up.

A. The New Brunswick is \$6,000, and the Norwich Union is \$5,000.

Q. Then the concurrent insurance with the Norwich Union policy would be \$26,000?

A. Would be \$26,000.

Q. And the concurrent insurance with the other policy would be \$25,000? A. \$25,000.

Q. Now, what was the plaintiff's loss upon this merchandise?

(Testimony of Fred Veatch.)

A. It figured a little better than \$31,000,—I think a few hundred dollars over, a small amount over.

Q. That would be less salvage. The actual loss would be [30] thirty-one thousand and some odd dollars, less the salvage? A. Less the salvage.

Q. Will you tell us, Mr. Veatch, how you arrived at the insurance loss or loss under that fire?

A. The number of gallons?

Q. Well, yes, the number of gallons.

A. Well, that was measured up by Mr. Juniper.

Q. Who is Mr. Juniper?

A. An adjuster with Mr. Webster.

Q. They came here for the purpose of adjusting these losses? A. Yes, sir.

Q. How did you determine the extent of the loss, or its value? A. By chemical analysis.

Q. No,—I don't mean that. Was the vinegar worth anything? A. The worth of the vinegar?

Q. Yes, the value.

A. Just please repeat that question.

Q. I want the amount of the loss, in dollars and cents.

A. Well, according to our figures on our books, it was \$31,116.

Q. How did you arrive at that?

A. By placing the value of—

Q. In other words, what was that vinegar worth at the time of its loss, per gallon?

A. That vinegar was worth 26 cents a gallon.

(Testimony of Fred Veatch.)

Q. And the total loss then would be the value per gallon, by the number of gallons?

A. Yes, sir. [31]

Q. You arrived at it in that way?

A. Yes, sir.

Q. Now, what did you do, if anything, with reference to giving the defendants notice of the occurrence of this fire?

Q. We wired to the head office—

Mr. DAVIS.—We will admit that notice was given.

Mr. MOORE.—You admit that due notice was given following the fire, as required by the terms of the policies?

Mr. DAVIS.—Yes.

Mr. MOORE.—Q. Did you ever at any time make any proof of loss under these policies?

Mr. DAVIS.—We will admit this—we will make this admission: That we are making no contention that no proofs were furnished. We are making no contention that there has been no violation of the policy contract in any of those respects, or no failure to conform to the conditions.

Mr. MOORE.—I prefer, Mr. Davis, if you would let me introduce the original proofs of loss, if you have them.

The COURT.—I see no reason for that. If they waive proof on that point, admit that you—

Mr. MOORE.—Complied with the provisions of the policy.

The COURT.—Yes. I see no reason for taking up the time of the Court.

Mr. DAVIS.—I would be glad to give it to you, Mr. Moore, but I haven't had time to find it. You just served those notices this morning.

Mr. MOORE.—Q. Now, what loss has Leo Brothers sustained under the \$5,000 policy of the Norwich Union Fire Insurance Society, Limited?

Mr. DAVIS.—I object to that, your Honor. I think that [32] calls for a conclusion, a computation.

The COURT.—Sustained.

Mr. MOORE.—Q. Has the defendant Norwich Union *Life* Insurance Society, Limited, of Norwich and London, England, paid to you any part, or paid to Leo Brothers Company any part or portion of the loss, of its liability for loss under this policy?

Mr. DAVIS.—We will admit that it has not been paid.

Mr. MOORE.—And the same admission with reference to the New Brunswick?

Mr. DAVIS.—Except the conclusion as to their liability.

The COURT.—Well, you have paid nothing?

Mr. DAVIS.—We have paid nothing.

The COURT.—On either policy?

Mr. DAVIS.—On either policy.

Mr. MOORE.—Take the witness.

(Testimony of Fred Veatch.)

Cross-examination.

(By Mr. DAVIS.)

Q. Mr. Veatch, you stated that Leo Brothers had owned this building since 1913, I believe?

A. Yes, the property.

Q. And at the time of their ownership the building was slightly different when they first acquired ownership? A. Yes, sir; very materially.

Q. How long have you been interested in Leo Brothers?

A. Since 1911, although the corporation was not formed until 1913.

Q. You were interested at the time they acquired this property? A. Yes, sir. [33]

Q. And I believe you are secretary and treasurer, or secretary and manager of the company?

A. I am secretary and manager, yes.

Mr. DAVIS.—We ask to have this marked as an exhibit.

A certain paper was marked Defendant's Exhibit No. 4.

Q. Handing you Defendant's Exhibit No. 4, and referring to page 4 thereof, about the center of the page, marked in a circle with indelible pencil, is that a fire map of the Leo Brothers plant?

A. When we purchased, that was, yes, sir.

Mr. MOORE.—This is hardly proper procedure and examination.

Mr. DAVIS.—Well, I have—

Mr. MOORE.—Well, all right.

(Testimony of Fred Veatch.)

Mr. DAVIS.—I want to go into these circumstances.

Mr. MOORE.—Then you had better offer it as an exhibit, for the purpose of examination.

Mr. DAVIS.—I will, as soon as he identifies it.

WITNESS.—Yes, that is—

Q. What date is that,—can you tell from looking at this map when it was prepared?

A. I think this map was brought down to date about—it was corrected in 1909.

Mr. DAVIS.—I will offer Defendant's Exhibit No. 4 in evidence.

Mr. MOORE.—For the purpose of his cross-examination?

Mr. DAVIS.—For the purpose of cross-examination.

Q. Now, Mr. Veatch, just briefly, so that the situation may be understood, just explain to the Court briefly what these portions are.

A. When we purchased that— [34]

Mr. MOORE.—We object to that as irrelevant and immaterial, the description of the property from a map back in 1909, something like eleven years before the writing of this policy.

Mr. DAVIS.—It is not for that purpose. It is for the purpose of describing and explaining the portions of the building as they were erected, which we have—

The COURT.—I am not sure that it is material. I will let it go in, however.

Mr. MOORE.—Allow us an exception.

(Testimony of Fred Veatch.)

WITNESS.—Yes, sir; that is a good picture or drawing of the plant when we first purchased it.

Q. What color is that?

A. That is pink. That is brick.

Q. What color is that?

A. Well, I don't know. I guess that is pink. I don't know. I am not—

Q. The pink is the brick portion? A. Yes, sir.

Q. And the yellow was the frame?

A. Yes, sir.

Q. The brick is two-story brick?

A. Two and a half-story brick.

Q. And the frame is—

A. That was just an old shed there, which we tore down.

Q. Mr. Veatch, have you your rating book?

A. No, sir; that was filed—that was—

Q. Just one page of it was used in the former trial.

A. I haven't it, because that was an old book that I have.

Q. You have it in your office?

A. I have a new one, yes. I haven't the old one. [35]

Q. What became of the old book?

A. Well, I don't know. I took that sheet out, and I don't think I paid any attention to it.

Q. You haven't disposed of it?

A. No. I think it is at the office, except that page isn't there.

Q. I will ask you to explain to the Court then.

(Testimony of Fred Veatch.)

Mr. Veatch, how you arrived at the rates for these buildings.

A. From a rate book which is furnished—

Mr. MOORE.—Just a moment. Under the evidence thus far, that is assuming a fact not—

Mr. DAVIS.—Very well. I may be previous in that.

Mr. MOORE.— —disclosed by the—

Mr. DAVIS.—I have other matters.

Q. I notice on one of these policies, Mr. Veatch, that the—on the New Brunswick policy, that the name is Fred Veatch, agent, and on the Norwich Union policy the name is Veatch Realty Company, agent.

A. Yes, sir,—the appointments were made that way.

Q. Fred Veatch was agent for the New Brunswick?

A. Yes, sir, and the Veatch Realty Company for the Norwich Union.

Q. And you handled, in your office, all the insurance business? A. Yes, sir.

Q. Who is the other Veatch that is a member of the firm? A. M. J. Veatch.

Q. That is your brother? A. Mrs. Veatch.

Q. But she is just a nominal member? [36]

A. Yes.

Q. You take care of all of the business?

A. Yes, sir.

Q. Now, Mr. Veatch, in placing this Leo Brothers' insurance, you were the only person in

(Testimony of Fred Veatch.)

connection with Leo Brothers that had anything to do with it, I believe you testified in the former trial, did you? A. Yes, sir.

Q. And so far as this insurance was concerned, Fred Veatch was Leo Brothers? A. Yes, sir.

Q. Now, in writing your insurance, in entering into these contracts of insurance with the insurance company, just what was the procedure? Did you ever have any communication with the company other than such as passed between you in your daily course of business, regarding this particular insurance, your insurance on Leo Brothers' factory? A. I think not, no, sir.

Q. The insurance was written in the routine manner? A. Yes, sir.

Q. Now, explain to the Court how you bind the company, what you do in writing the insurance.

A. We write the policy and mail the daily report to the company on the day it is written.

Q. Explain to the Court what this daily report is, and what it contains. A. Can I use—

Q. Yes,—if you have your daily reports on these two policies—

A. These policies come to us with two of these inside of the policy. [37]

Q. You are referring to the—

A. To the daily reports, yes.

Mr. DAVIS.—May I take those and have them marked?

WITNESS.—They are my office copies.

(Testimony of Fred Veatch.)

Said reports were thereupon marked Defendant's Exhibits Nos. 5 and 6.

Q. I hand you Defendant's Exhibits 5 and 6, one of which says "Agent's record of the New Brunswick Fire Insurance Company," and the other says, "Agent's duplicate copy of daily report, Norwich Union Fire Insurance Society." When you say the policies come to you with two of these, you mean two copies of—

A. Daily reports.

Q. Daily reports?

A. One says "Daily report" and the other says "Agent's record," or "Agent's copy."

Q. And that doesn't include these printed slips?

A. It doesn't include these riders, no, sir. The policy is written with one—just all written at one time. The one action completes the policy and the daily reports, both of them. The daily report is original and the others are copies. The first copy is the one that is sent to the company, and the second copy is the one kept for the agent's records. With the exception of the riders—

Q. That is the pasted on slips?

A. Yes, the printed slips are written three at a time, and the original is pasted on the policy, the next one is pasted on the report that goes to the company, and the third copy is pasted on the agent's copy, which is retained at the office.

Q. A portion of these instruments that are not the printed slips, they are not pasted on the policy?

A. No, sir. [38]

(Testimony of Fred Veatch.)

Q. Just these slips attached? A. Yes, sir.

Q. And then what becomes of these daily reports that you say go to the company? To whom do you mail them,—to the Norwich Union?

A. To the Board of Fire Underwriters, at Salt Lake City.

Q. And then they mail them on to the company?

A. I suppose so. I have no knowledge of that part.

Q. Well, you don't know then whether these policies were communicated to your company or not?

A. I have no personal knowledge of it.

Q. How long have you been in the insurance business, Mr. Veatch? A. About 32 years.

Q. You do know that these policies go on to the company, don't you?

A. Well, they certainly get them, I know that.

Q. You don't bind your company without advising them? A. No, sir, I never do, I think.

Q. You advise your company when you attempt to bind them?

A. Yes, sir. I think there is no question but what the Board at Salt Lake City sends them on to San Francisco.

Q. Haven't you become sufficiently familiar in your thirty years' experience to know that that is done? A. I am sure of it, yes, sir.

Q. You mail these to the Board so that they check up on the rates? A. Yes, sir.

Q. And then they mail them on to the company?

(Testimony of Fred Veatch.)

A. Yes, sir. [39]

Q. And that is the way the company learns of the risks? A. Yes, sir.

Q. In referring to the risks you referred to the Sanborn map that was in your office?

A. Yes, sir.

Q. And described the policies, described the risk that you undertook to insure, by reference to these Sanborn maps? A. Yes, sir.

Q. And in computing your rate, the company has a surveyor come around, the Board of Fire Underwriters has a surveyor come around, and he surveys the buildings for fire hazards, does he not?

A. Yes, sir.

Q. And then they publish a specific rate for each building in the business section of Moscow?

A. Yes, sir.

Q. That is the sheet you were referring to a while ago, which was offered in evidence in the other trial? A. Yes, sir.

Mr. DAVIS.—I offer these daily reports, your Honor, being 5 and 6, of the defendants.

Mr. MOORE.—May I see them just a moment? These are Mr. Veatch's?

WITNESS.—Yes, sir.

Mr. MOORE.—Not yours?

Mr. DAVIS.—Those are identical copies with what you sent the company? A. Yes, sir.

Q. And who is the general agent for the New Brunswick to whom you report? [40]

A. At that time I think Mr. Alverson; I think he

(Testimony of Fred Veatch.)

was alive at that time. Now it is Mr. Junker, I think, is the manager of that.

Q. Mr. Alverson was agent? It was the same office anyway?

A. Yes, sir, the same office.

Q. And he is general agent also for the U. S. Fire, also? A. Sure, U. S. Fire only.

Q. You report U. S. Fire to him also?

A. Yes, sir.

Mr. MOORE.—Have you the copy of this sent to the company?

Mr. DAVIS.—Well, I may or may not have. Mr. Veatch says this is a copy. Maybe Mr. Veatch can tell. Are these two instruments—

Q. Just handing you two papers. Tell me if those are the ones you sent to the company, or if those are copies.

A. No, sir, these are not copies. These were made out at the time of the fire, for the benefit of Mr. Webster.

Q. Both of these? A. Both of those?

Mr. DAVIS.—Well, I may have the originals, but I doubt it. Any objection?

Mr. MOORE.—No objection.

Mr. DAVIS.—I will ask to have this marked.

A certain paper was marked Defendant's Exhibit No. 7.

Q. I will hand you Defendant's Exhibit No. 7, and ask you to refer to that and state whether or not that is the specific rate of Moscow referred to.

A. Yes, sir, taken from their rate book, yes, sir.

(Testimony of Fred Veatch.)

Q. When you wrote your policies then, at the time those policies were written covering this property, you referred to [41] this book for classifying and fixing your rate and the risk, did you not? A. Yes, sir.

Q. And so reported to the company?

A. Yes, sir.

Q. At the top of this page it says, "Main Street, east side, Moscow, Idaho, p. 3." This "P 3" means page 3? A. Yes, sir.

Q. Specific rates of Moscow? A. Yes, sir.

Q. And number of rating,—that refers to the number of the building? A. Yes, sir.

Q. Location, class, occupation, building contents, rating takes effect. Now, the number one says, "C" and "A" Streets, block 1 and 2. That merely starts the block off? A. Yes, sir.

Q. Number two says, southeast corner "C" 244, C D vinegar factory, 250—or vinegar factory, 250, 250. The first 250 refers to the rate on the building? A. Yes, sir.

Q. And the second refers to the rate on the contents? A. Yes, sir.

Q. Line 3 of this rate book says, south—what does that mean? Does that refer to the risk south of the southeast corner?

A. It means next south.

Q. D vinegar tanks, building 245, contents 245. That refers to the vinegar tanks risk?

A. Yes, sir. [42]

Q. And the contents? A. Yes, sir.

(Testimony of Fred Veatch.)

Q. And two forty-five means the rating? That is two forty-five a hundred? A. Yes, sir.

Mr. DAVIS.—I would like to offer Defendant's Exhibit No. 7.

Mr. MOORE.—No objection.

Mr. DAVIS.—Q. Now, Mr. Veatch, referring to the value of this property, you said you had 129,650 gallons in the tanks in that frame building?

A. Yes, sir.

Q. Now, how have you arrived at that?

A. They were measured. Mr. Juniper made his own measurements on that.

The COURT.—How much was that?

Mr. DAVIS.—129,650 gallons.

A. I measured it up immediately after the fire. When Mr. Juniper came down to make the adjustment he went down to measure it alone, and there was only about 350 or 360 gallons difference between us, so I just let him use his figures.

Q. Did you have any book records of the amount of vinegar you had on hand? A. Yes, sir.

Q. How does this compare with your book records? A. I think closely.

Q. Do your book records show how much vinegar was in this building and how much in the other?

A. No, sir.

Q. You didn't keep them segregated?

A. No, sir; that is impossible. [43]

Q. You said you had \$31,116 loss?

A. On stock. I think that is what our figures show.

(Testimony of Fred Veatch.)

Q. Just tell me how you arrived at that? Did you arrive at that by multiplying 129,650 by 26?

A. By 24.

Q. How did you arrive at the 24 figure?

A. Well, the principal reason we did that, we figured that—I was under the mistaken impression that we could only put in the manufacturing cost.

Mr. MOORE.—Cost of what?

A. The cost of the stock, of the vinegar. But I was advised later that the replacement value was what we should have figured.

Q. You put this in at 26 cents per gallon?

A. I put it in our proof of loss that we made up at 24 cents a gallon, and that amounted to, I think, \$31,116.

Q. Where did you get your figures of 24 as replacement cost?

A. That wasn't—that wasn't our replacement cost. That was cost of manufacturing, from our books.

Q. What did that include?

A. Our manufacturing cost?

Q. Yes.

A. That includes all of our expenses, everything.

Q. It includes your overhead?

A. It includes overhead, taxes, insurance, interest, wages, salaries.

Q. For the entire plant?

A. For the entire plant. There is only one product there that can take care of the cost, and

(Testimony of Fred Veatch.)

that is vinegar. There is [44] only one turn-over a year with that product.

Q. And did you base that on a year's operation?

A. No, sir. We closed our books as of the night of the fire, and made our figures from that. The end of our fiscal year is September 30th, and we always close our books at that time, and make our inventories; but at this time we closed our books as of the night of the fire, and brought down the balance as of that date.

Q. And it cost you 24 cents a gallon?

A. Twenty-four cents a gallon was our figures on that.

Q. And that is what it would have cost you to replace that, 24 cents a gallon?

A. Well, at that time, of course, we had no facilities to replace it.

Q. What grade vinegar was this, Mr. Veatch, if that is a proper way of describing it?

A. It was six and a half per cent acidity.

Q. Now, just tell the Court, and me also, what standard six and a half per cent acidity is.

A. Six and a half per cent is a very high standard for vinegar. The Government pure food law requires four per cent acidity. Practically all the states, with the exception of a few, have that same standard. There is one or two that require four and a half per cent acidity.

Q. That is based on—

A. Your market is based on your four per cent acidity.

(Testimony of Fred Veatch.)

Q. Where is your market,—here in this part of the country?

A. Well, sir, we have shipped as far east as Buffalo, New York, and all through the middle west. Ordinarily our market [45] is in the northwest, in the three states of Oregon, Washington, Idaho, and Montana.

Q. To arrive at 26 cents a gallon replacement cost, you say, from where did you obtain your prices?

A. From practically every factory doing business in the northwest.

Q. What was that based on? Did you ask for submission of prices for replacing this vinegar?

A. Yes, sir.

Q. Or did you consult just the market prices?

A. No. We asked for prices.

Q. Was that 26 cents a gallon—what was that based on, what kind of vinegar?

A. That was based on the prices of four per cent acidity vinegar.

Q. Then you mean you get your prices of four per cent acidity vinegar and figure up and down?

A. Yes. I will explain. There is a spread—that is, the market conditions over the United States—there is a spread of two cents a gallon for every half of a per cent of acidity.

Q. Two cents a gallon? A. Yes, sir.

Q. So then the market price of four per cent acidity was less than 24?

(Testimony of Fred Veatch.)

A. Yes, sir; I think at that time we were marketing our vinegar at about between 16 and 17 cents for the naked juice, not including the cooperage. That costs from six to seven cents a gallon, your barrels.

Q. You say that was not included? How much did you say that was? [46]

A. I said we was getting net 16 and 17 cents a gallon for four per cent acidity vinegar.

Q. You were getting net that much here at Moscow? A. Yes, sir.

Q. At the time of the loss? A. Yes, sir.

Q. And you add two cents for a degree of acidity?

A. Two cents a gallon for each half a per cent of acidity.

Q. So four per cent, between four and six and a half per cent, that is what you said your vinegar was? A. Yes, sir.

Q. That two and a half degrees—

A. That makes a spread of ten cents.

Q. And that is the way you arrived at your 26 cents? A. Yes, sir.

Q. When had the vinegar been tested for this acidity?

A. We test our generators every day when we are making the run.

Q. Now this vinegar wasn't totally destroyed, was it? A. No, sir.

Q. It had deteriorated by reason of the fire?

A. Yes, sir.

Q. That is correct? A. Yes, sir.

(Testimony of Fred Veatch.)

Q. And the vinegar was sold to some vinegar people, or salvage people—to whom was it sold?

A. It was sold individually to Mr. F. C. Divans and Mr. Porter,—I can't think of his initials.

Q. They are vinegar dealers?

A. They are vinegar and pickle men in Seattle.

[47]

Q. For what was it sold? A. For what price?

Q. Yes.

A. Six cents a gallon. Mr. Webster made that sale.

Q. He made it for your benefit? A. Yes, sir.

Q. You received the money?

A. Yes, sir. I received five and a half cents a gallon on that. The brokerage firm that he sold to charged a half a cent a gallon brokerage. That was deducted. We received five and a half cents salvage on a hundred—we didn't receive that on 129,650 gallons; we received that on 115,800 gallons, I think.

Q. And what did that total, do you recall?

A. Can I refer to my books?

Q. Yes.

A. We received net on that \$6,369.

Q. Now, Mr. Veatch, what other companies do you claim had insurance on this vinegar that was damaged?

Mr. MOORE.—Just a moment. Have you a list, Mr. Veatch, so that you can be accurate in that?

A. Can I refer to my books a minute again?

Mr. DAVID.—Yes,—better get them up here.

(Testimony of Fred Veatch.)

A. You want me to give the amounts, or just the companies?

Q. The companies and amounts.

A. The Home of New York had \$10,000. The Liverpool, London & Globe had \$10,000. The New Brunswick Fire Insurance Company had \$6,000; and the Norwich Union Fire Insurance Society had \$5,000.

Q. Have you the daily reports of the Liverpool, London & [48] Globe and the Home with you?

A. I think they were filed in the other court, Mr. Davis.

Mr. MOORE.—I have no objection to that, Mr. Davis, but—

Mr. DAVIS.—I want to offer that other later anyway, and I will just keep them together.

A certain paper was marked Defendant's Exhibit No. 8.

Q. Now, handing you Defendant's Exhibit No. 8, for identification, look at these four instruments that comprise this number eight, and state to me what they are.

A. The first one is the policy of the Home of New York.

Q. Daily report?

A. Daily report, yes, copy of daily report, or agent's record, covering \$5,000 on stock of vinegar. The next is the United States Fire Insurance Company policy covering \$250 on building and \$1000 on tanks. The next one is the Liverpool, London & Globe Insurance Company policy covering \$10,-

(Testimony of Fred Veatch.)

000 on stock. And the last one is the Home Insurance Company policy covering \$5,000 on stock.

Q. You mean when you say policies—

A. Agent's records of the policies.

Q. Eliminating the United States Fire for the present,—these are the policies you refer to when you say you had concurrent insurance in addition to the insurance carried by the two defendants here?

A. Including the two other daily reports.

Mr. DAVIS.—May I have you mark these also as A, B, and C, etc.?

Certain papers were marked as Defendant's Exhibits 8A, 8B and 8C.

Q. Mr. Veatch, I will call your attention—Defendant's [49] Exhibit 8, without further identifying the mark, is the policy of the Home Insurance Company for \$5,000, covering the vinegar?

A. Yes, sir.

Q. Defendant's Exhibit 8A is the \$10,000 policy of the Liverpool, London & Globe?

A. Yes, sir.

Q. And Defendant's Exhibit 8B is the \$250 and \$1000 policy of the United States Fire?

A. Yes, sir.

Q. Which has no reference to the stock?

A. No, sir.

Q. And Defendant's Exhibit 8C is the other \$5000 policy, copy of the other \$5000 policy of the Home? A. Yes, sir.

Q. Which you state covers also on stock?

(Testimony of Fred Veatch.)

A. Yes, sir.

Q. Stock you are referring to here?

A. Yes, sir.

Mr. MOORE.—Have you offered that in evidence?

Mr. DAVIS.—I will offer that in evidence.

Mr. MOORE.—Do you object to stating your purpose?

Mr. DAVIS.—I am offering it for two different purposes,—one purpose, of showing the construction Mr. Veatch placed on the policy, and the other purpose, showing his other insurance.

Mr. MOORE.—It is admitted that there was other concurrent insurance, and I think it is incompetent to place any interpretation upon this particular policy, and it is irrelevant and immaterial. Here are two policies written by the defendants, and he wants a construction of those policies by daily reports made to other companies carrying concurrent insurance. [50]

Mr. DAVIS.—I wish to put the Court in the situation of the parties at the time the contract was entered into.

The COURT.—I think I shall receive them and consider them.

Mr. MOORE.—Allow us an exception?

The COURT.—Yes.

Mr. DAVIS.—Q. Now, Mr. Veatch, to get at this loss, the amount of your loss, Mr. Juniper,—Webster and Juniper are independent adjusters, are they not? A. I understand so.

(Testimony of Fred Veatch.)

Q. And they are at various times employed by the various insurance companies to meet with the assured and determine the amount of loss with the assured? A. Yes, sir.

Q. Mr. Juniper was the first member of the firm of—do you know whether or not they were employed by the different insurance companies that were interested in this loss, this Leo Brothers loss, at the time it occurred?

A. I have no personal knowledge, with the exception of two companies.

Q. You received communication from the—

A. From two companies, the Automobile Fire Insurance Company and the Home Insurance Company, to have Messrs. Webster & Juniper adjust their losses.

Q. But did you not receive communications from the Norwich Union and others of the companies after Mr. Webster and Juniper had been on the ground, in which they advised that Webster & Juniper were representing them?

A. No, sir.

Q. Then you don't know that Webster & Juniper represented [51] any of these companies then?

A. Not of my own personal knowledge, with the exception of those two.

Q. You undertook, on behalf of yourself and Leo Brothers with Mr. Webster and Mr. Juniper assuming to act for these different companies to arrive at the amount of your loss and damage, did you not? A. Yes, sir.

(Testimony of Fred Veatch.)

Q. And you had extended negotiations with them, and Mr. Juniper helped you measure your vinegar, and test your vinegar, and they found a purchaser for your salvage, and helped you negotiate the deal with the salvage purchasers, did they not?

A. Yes, sir.

Q. And eventually when the amount of loss and damage had been determined between you and Mr. Webster, Mr. Webster assisted you in preparing proofs of loss to be submitted to the companies?

A. No, sir.

Q. He did not?

A. No, sir. I will say that on those losses that we did agree on, Mr. Webster prepared and sent down what he marked "compromise" proofs of loss.

Q. As a matter of fact, you and Mr. Webster had agreed upon the amount of loss and damage?

A. On a great deal of the stuff, yes.

Q. And on this stock also?

A. No, not on stock; we never agreed on that.

Q. Was there ever any controversy between yourself and the Home and the Liverpool, London & Globe, as to whether or not there was any liability at all?

A. Not with me, not direct with them. I don't know. [52]

Q. Was there ever any controversy with you and Mr. Webster, representing them, as to whether or not they covered and were liable for the loss?

A. They certainly were a long time admitting liability.

(Testimony of Fred Veatch.)

Q. Was there ever any time during your negotiations with Mr. Webster, any hint or suggestion from him, that the Liverpool, London & Globe and the Home were not liable for the loss?

A. No attempt of Mr. Webster.

Q. At all times, so far as he was empowered and able, he admitted liability?

A. I don't think he admitted liability. I never knew Mr. Webster to admit liability on anything, but I think he said they were not denying liability.

Q. Then you and Mr. Webster undertook to arrive at the amount of loss and damage for these policies at least?

Mr. MOORE.—We object to that if it is simply for the purpose of showing that they settled and compromised.

Mr. DAVIS.—I am showing that they didn't compromise.

The COURT.—Overruled.

A. I want to say in this connection that Mr. Webster did not help us prepare any proof of loss. We had to prepare our own proof of loss, and served on the Home of New York and the Liverpool & London & Globe, the same as the others.

Q. That was at the beginning?

A. To save our rights, before the sixty days expired.

Q. But Mr. Webster prepared the proofs upon which you finally received your payment from the Home and the Liverpool & London & Globe?

A. Yes, sir.

(Testimony of Fred Veatch.)

Q. In preparing those and in preparing your agreement [53] with these two companies, you and Mr. Webster arrived at a loss of nineteen thousand five hundred and some odd dollars, did you not?

A. No, sir, I don't think so.

Q. Do you recall upon what basis the Home and the Liverpool & London & Globe paid?

A. We compromised on a basis of twenty cents a gallon, of those companies that wanted to settle.

Q. What was your total net loss under your agreement?

A. Can I refer to my book just a second?

Q. Yes, I want you to.

A. Those cases we settled, we settled on the basis of a loss of \$25,930.

Q. Was that your net loss?

A. That was the gross loss.

Q. You weren't paid the gross loss?

A. Porter and Divans turned in their check for the amount of the salvage, turned right in to us.

Q. And then you deducted that from your loss?

A. Yes. Then Mr. Webster used as his figures on that \$19,561.

Q. Which was your net loss, on that basis?

A. Yes, sir.

Q. That salvage check came direct to you.

A. Yes, sir.

Q. The insurance companies didn't participate in that?

A. No, sir; that came right direct; Mr. Webster was here and—

(Testimony of Fred Veatch.)

Q. Up until the time of the closing of this loss, the final closing, based upon the apportionment, which included these two [54] companies that were here, Mr. Webster never at any time, for these two companies, admitted that these two companies were liable, did he?

A. Mr. Webster never admitted that any companies were liable, to me.

Q. He admitted the Liverpool & London & Globe and the—

A. He finally settled, but I never heard him admit that they were.

Q. You were prepared to furnish proof and accept your payment from these companies—there was no controversy between you and Mr. Webster as to the amount of your loss, and you had arrived at it after the salvage men had taken over and cleared up matters there,—was there?

A. No, sir. There was no controversy between us at all in regard to these companies, the two companies defendants in this suit.

Q. I said, had there been any controversy regarding the amount of your loss?

A. With Mr. Webster?

Q. Yes.

A. There was a great deal, yes.

Q. I say, after the time the salvage men cleared this matter up for you, and you finally arrived and knew what your loss and damage was going to be, from that time up to the time of payment by

(Testimony of Fred Veatch.)

the Home and the Liverpool & London & Globe, there was no controversy of the amount?

A. No, sir.

Q. You arrived at the amount of loss and damage and accepted your—

A. On a compromise basis. [55]

Q. Did you not communicate with Mr. Webster regarding that matter in substance as follows: I don't recall whether the communication was in writing or oral, but the substance was that you did not wish to accept the payment from the Liverpool & London & Globe and the Home at that time, for fear of jeopardizing any rights which you might have against these other two companies; that was one reason for your hesitancy in closing with those two companies, was it not?

A. I don't think that question ever came up. I am positive of it. I will be very glad to go through my files at noon and see whether I can find a copy, but I am positive that question never came up.

Q. When you were ready to accept your money from these other two companies you asked that the word "compromise" be written in the proofs?

A. No, sir.

Q. You are sure of that?

A. I am absolutely sure of that?

Q. Who asked that?

A. I don't know. The fact of the business is that every proof of loss that Mr. Webster sent down was marked "compromise" on the buildings and the machinery and those various other com-

(Testimony of Fred Veatch.)

panies that settled, every one of their proofs of loss was marked, typewritten right across, compromise, in typewriter, and then, underneath that, "Proof of Loss."

Q. Was that not done at your request, Mr. Veatch, by reason of the fact that you did not wish to take any position with reference to any of these companies that would prejudice your rights here?

A. No, sir. [56]

Q. Was there ever at any time a suggestion of a compromise on the amount, at the time these proofs were taken? When Mr. Webster first came down there you dickered back and forth in arriving at your loss and damage?

A. We arrived at practically all the loss, I think, on the building—

Q. I am just talking about the—

A. I think we arrived at the loss on practically everything with the exception of the stock and a few small lots of machinery which we agreed on at the other trial.

Q. You mean by stock, your vinegar?

A. Yes.

Q. And when did you agree on your stock?

A. We never did agree on the stock. We accepted a compromise of twenty cents a gallon, but we never did agree on it.

Q. That was a compromise between you and Mr. Webster, made long before there was any proof submitted, or admission of liability by the Home or the Liverpool & London & Globe?

(Testimony of Fred Veatch.)

A. We had served our own proofs of loss on them long before this occurred.

Q. And in those proofs of loss you claimed a much larger loss?

A. Yes, sir,—just the same as we are claiming here.

Q. You didn't make any credit for salvage?

A. At that time there was no salvage.

Q. You claimed a larger amount than eventually showed was your actual loss?

A. Yes, sir.

Q. No matter whose figures you take,—ours or yours? A. Yes, sir, that was right. [57]

Q. This compromise you speak of, between you and Mr. Webster, was made after those proofs were taken, but long before the Liverpool & London & Globe and the Home signified their willingness and readiness to pay?

A. Yes, sir. I can get you the exact date. It was long after we had served proofs of loss on all the other companies, when this other settlement was made.

Q. That was the basis on which those two companies paid?

Mr. DAVIS.—I wish to have these marked.

Certain papers were marked as Defendant's Exhibits 9 and 10.

Q. Exhibits 9 and 10, those are the copies that you sent to the companies, are they not?

A. No, sir, those are not.

(Testimony of Fred Veatch.)

Q. These are the copies you furnished Mr. Webster?

A. Yes, sir. Whenever a fire occurs the first thing I do is to have my stenographer prepare copies of the daily reports, because that is the first thing the adjuster asks for. I didn't even check these. I just had the stenographer copy these off and have them ready for Mr. Webster when he came down, and they were delivered to Mr. Juniper just as soon as he arrived.

Q. Can you tell whether this is the one you kept in your office? Are those supposed to be exact duplicates of the copies you sent to the company?

A. Yes, sir, they are supposed to be. I don't know. Now I can't say. I can't say that those—whether those are the copies that were made for Mr. Juniper or Webster, or whether they are the ones that went to—or whether they are the ones—I am inclined to think that they are the ones that were made for Mr. Webster and Juniper. I don't believe that [58] they—I can't be positive.

Q. They are at least the ones you furnished—they are either the ones—

A. Either the ones I furnished Mr. Webster or—

Q. Or the ones you sent to the company?

A. Yes, sir.

Q. In any event, they are one or the other?

A. Yes.

Mr. DAVIS.—I offer that in evidence.

Mr. MOORE.—They relate to what insurance?

(Testimony of Fred Veatch.)

Mr. DAVIS.—Norwich Union and New Brunswick. Defendant's Exhibits 9 and 10.

Q. Now, Mr. Veatch, in reporting—I believe you stated that you reported for the U. S. Fire and the New Brunswick to the same company?

A. Yes, sir.

Q. And the U. S. Fire was one of the policies that was on this risk? A. Yes, sir.

Mr. DAVIS.—Now I would like to have this marked.

Sanborn Fire Map marked as Defendant's Exhibit No. 11.

Q. Referring to page 4 of Defendant's Exhibit No. 11, I will ask you to look at that and state what that is.

A. That is a Sanborn—a copy of Sanborn's Fire Map of the city of Moscow, which was corrected to October, 1914.

Q. Now, that was—indicates a slight change from the other two maps, the map of 1909 and also the map of 1918, does it not?

A. Yes, sir. [59]

Q. The part that is marked around with what appears to be a lead pencil clear around, that comprises the Leo Brothers? A. Yes.

Q. That is on page 4 of the exhibit?

A. Yes, sir.

Q. The part where there is a large "D," and marked "vinegar tanks," that is the way this vinegar shed and tanks originally stood?

A. The first year, yes.

(Testimony of Fred Veatch.)

Q. There is 35 feet distance between it and the main plant? A. Yes, sir.

Q. There is a little projection there, yellow, on the southeast side of the upper portion of the building,—what is that, marked with an “S”?

A. That is the little shed roof that came down over some scales we had there.

Q. This yellow portion marked “D” was—

A. Was the first small shed buildings we put up there.

Q. This was 35 feet away from the main building?

A. Yes, sir.

Q. At all points? A. Yes, sir.

Q. The portion marked with a large “A” was what? A. That is our pressroom.

Q. And the portion marked with the large “B”?

A. Our loading room.

Q. And the large “H”?

A. That is the two and a half or three-story brick there that we use for bottling and generating, and various purposes of that kind.

Q. Now, when was the large addition made to the “D” as [60] you show it here?

A. I think we started that in 1914, and I think finished it in 1915.

Q. I believe you testified in the former trial, Mr. Veatch—

A. I can't remember exactly, but along in that time.

Q. 1914 and 1915?

A. Yes. It wasn't completed in 1914, because

(Testimony of Fred Veatch.)

it wasn't completed when this map was finished, in October, 1914.

Q. I am going to call your attention to your testimony in the former trial—but when you erected this building you erected it in some way so that you could add to it?

A. Yes, sir. With the intention of adding to it.

Q. And you did add to it, so that it is now what size, as shown on page 4 of the 1918 map?

A. Yes, sir. In other words, this shed was extended out to here, over to here, and back to the main street there.

Q. Now, Mr. Veatch, I notice in a good many of these policies you refer to 240 Main Street?

A. Yes, sir.

Q. What building is that?

A. That was this little building here. That was an arbitrary number that I put on there at my office. It never was on Sanborn's map or any other record.

Q. You did put it on the Sanborn map in your office?

A. You can see that right there. On the 1918 map I think you can see where it was pasted over there, marked in pencil, 240.

Q. 240?

A. Yes, sir, which I had done myself. [61]

Q. You had done it on your 1918 map also.

A. Yes, sir.

Q. And there was that 240 on your map at the time these policies were written?

(Testimony of Fred Veatch.)

A. Yes, sir. My own pencil memorandum. That was underneath. When this map was in this shape. Then we send this map back for correction every so often, and they just pasted a slip over this,—the 240 only shows under this slip.

Q. On your 1918 map?

A. On the 1918 map, yes, sir.

Q. Have you continued to refer to it as 240 in these policies? A. Yes, sir.

Mr. MOORE.—What policies, Mr. Davis?

Mr. DAVIS.—The several policies you were writing? Yes. In the policy, the United States policy,—that is, in the daily report, which I understand you to say was the only communications you ever had with the insurance companies about writing this insurance for them, in the United States policy you covered the following described building, or a building described as No. 240, on the east side of Main Street between “C” and “A” Streets in Moscow, Idaho, \$250, on a one-story shingle roof frame building and its additions, if any, of like construction, communicating and in contact therewith, etc., only while occupied for storage of vinegar purposes; \$1000 on tanks, all while contained in the above building, and that is described,—on the following described—all situated at 240 on the east side of Main Street between “C” and “A” Streets, in Moscow, Idaho. Now, that daily report you sent down to Mr. Alverson, who was general agent for the United States? [62]

A. Yes, sir.

(Testimony of Fred Veatch.)

Q. And the daily report of the New Brunswick you also sent to Mr. Alverson? A. Yes, sir.

Q. You described the property—your description in the daily report that you sent to Mr. Alverson, for the New Brunswick, as follows: On the following described property, all situate at No. 244 on the southeast corner of Main and “C” Streets, in Moscow, Idaho. \$6000 on merchandise, etc., which has already been read. A. Yes, sir.

Q. That is the description which you gave Mr. Alverson for the U. S. policy? A. Yes, sir.

Q. And you applied the two-fifty rate in the Norwich Union policy, or I mean in the New Brunswick policy and the Norwich Union policy?

A. Yes, sir.

Q. And the two forty-five rate in the U. S. policy?

A. Yes, sir.

Q. And the policies you described as two-forty?

A. Yes, sir.

Q. You also applied the two forty-five rate in the Home and the Liverpool & London & Globe policy? A. Yes, sir.

Q. And in both those policies you describe the property insured as the property located at 240 Main Street? A. Yes, sir.

Q. Now, you have no authority to change rates?

A. Absolutely no, sir. [63]

Q. You are bound by the rating schedules?

A. Yes, sir.

Q. And I believe you testified that you had no

(Testimony of Fred Veatch.)

intention or never had any time applied the co-insurance or reduced rate average clause?

A. No, sir, we never have.

Q. You insured two risks specifically?

A. The Home of New York and the Liverpool & London & Globe, yes, sir.

Q. And also the New Brunswick and the Norwich Union? A. That wasnt so intended but—

Q. But that is the way you wrote it?

A. Yes, sir.

Q. You applied the specific rate?

A. Yes, sir.

Q. Referring to your companies you noted to these companies when you applied these rates, you noted the particular reference to the particular rates? A. Yes, sir.

Q. They then would know what you were referring to? That was your only means of communicating the manner in which you applied the rates?

A. Yes, sir.

Q. Now, Mr. Veatch, how much—how many—or how long had you been insuring your pickle works or your vinegar works with the New Brunswick?

A. I think that was the—my recollection is that that was the first policy.

Q. You could tell by the—

A. I could tell by the daily report, yes, sir. [64]

Q. To see whether or not it is a renewal or not?

A. Yes, sir.

Q. You can't tell by looking at the policy, can you?

(Testimony of Fred Veatch.)

A. No, I don't think I can tell by the policy. I could tell by the daily report.

(Mr. Davis handed paper to witness.)

A. The New Brunswick was a renewal—I can find that out for you and answer that question. That is a new policy, yes, sir.

Q. The Norwich Union was a new policy?

A. Yes, sir.

Q. And can you tell how long you had insured with the U. S.?

A. I couldn't tell without chasing that back. That has been renewed several times. Of course that is a renewal of the first policy that was ever written on that frame building.

Q. And in all your U. S. policies you described 240? A. Yes, sir.

Q. And in all your—if you had any renewals of this New Brunswick you described 244, is that correct? A. Yes, sir.

Q. And in all those policies you applied the rate on the property that you described as 240, you described the rate on line 3, page 3? A. Yes, sir.

Q. Took the rate described in the risk at line 3, page 3?

A. Yes, sir, on the contents of the tanks.

Q. And on the property described as 244 you always described the rate used on line 2, page 3, of the specific rates? A. Yes, sir.

Q. Now, in all your policies you refer to this Sanborn map [65] of yours. A. Yes, sir.

(Testimony of Fred Veatch.)

Q. And all these various matters that you refer to when you refer to your company? A. Yes, sir.

Mr. DAVIS.—I think that is all.

The COURT.—I think we will take a recess until two o'clock.

Mr. DAVIS.—I may want to ask you one or two questions about some dailys, if you will look them up.

An adjournment was thereupon taken until 2 P. M. of this date, Friday, May 19, 1922. [66]

2 P. M., Friday, May 19, 1922.

FRED VEATCH, a witness heretofore duly sworn in behalf of plaintiff, upon being recalled, testified as follows:

Cross-examination (Continued).

(By Mr. DAVIS.)

Mr. DAVIS.—I identified this, but I neglected to offer it, Defendant's Exhibit No. 11. I offer it.

WITNESS.—Mr. Davis, before you start in,—one question you asked me this morning, about that word "compromise," or about some correspondence we had on that affair in my file, I find in my file a letter to Mr. Webster about striking out the word "compromise" in the U. S. Fire Insurance Company's proof. That is all I can find in that.

Mr. DAVIS.—If I may see it then.

Mr. MOORE.—Have you the original?

Mr. DAVIS.—I don't think so. Mr. Veatch says he wrote it.

(Witness handed paper to Mr. Davis.)

(Testimony of Fred Veatch.)

Mr. MOORE.—Mr. Veatch, have you the original to which you replied?

WITNESS.—That was in response to a telephone conversation, Mr. Moore.

Mr. DAVIS.—Well, I will have marked these two letters.

Said letters were thereupon marked Defendant's Exhibits 12' and 13.

Mr. DAVIS.—Q. Mr. Veatch, I will hand you Defendant's Exhibits Nos. 12 and 13, and ask you to look at them and tell us briefly what they are.

A. Yes, sir. Those are two letters. I have a copy of this one also, if you would like it.

Q. The original of one letter that you sent to Webster & Juniper? [67]

A. And the other is a carbon of a letter written to Webster & Juniper.

Q. In reference to this loss? A. Yes, sir.

Mr. DAVIS.—I will offer these in evidence, Mr. Moore.

Mr. MOORE.—I think I have no objection to that one. What is that one?

WITNESS.—In regard to that telephone conversation.

Mr. DAVIS.—Defendant's Exhibit 13 admitted. Shall I read this, or hand it to the Court?

The COURT.—Let me have it.

(Mr. Davis handed paper to the Judge.)

Mr. MOORE.—There will be no objection.

Mr. DAVIS.—Q. This pencil mark on there was not on there when you wrote it? A. No, sir.

(Testimony of Fred Veatch.)

Mr. DAVIS.—I offer in evidence Defendant's Exhibit 12, then, which it is agreed may be admitted.

(Mr. Davis handed paper to the Judge.)

Q. Mr. Veatch, I am going to ask you to explain the physical structure of those buildings, briefly, so that—first, let me ask you—

Mr. MOORE.—I think His Honor ought to see this.

Mr. DAVIS.—Yes.

Q. Explain the physical structure—First, let me ask you, do these Sanborn map numbers conform to the street numbers?

A. In some cases they do, and in some case they are arbitrary.

Q. In the cases where you have a complete set of street numbers, they endeavor to conform to the street numbers? [68]

A. In most cases, wherever they can.

Q. For example, 244 is also 244 Main Street, in this case? A. I am inclined to think so, yes.

Q. And these maps are furnished you by the company, and when the Sanborn surveyors correct it, you get the corrections? A. Yes, sir.

Q. And the companies have copies of these maps to refer to, and you refer this to them?

A. Yes, sir.

Q. Now, take the factory building, 244, which is the northern portion or part marked around with the pencil, and you have already described the general structure—this portion, the southwest

(Testimony of Fred Veatch.)

corner is brick and the other portion is frame; the strip that runs across to the south is also frame, is it? A. Yes, sir.

Q. What is the distance between the buildings?

A. The driveway, I think—I am not sure, but I think it is 15 or 16 feet, somewhere along there.

Q. A concrete driveway?

A. Up to here. Then there is a wooden driveway that rises up to the scale there.

Q. And then—

A. Then it is a wooden construction driveway out to the alley, yes, sir.

Q. And this vinegar tank, the 240 here, is a wooden building? A. Yes, sir.

Q. And when—how is it inclosed?

A. It was boarded up on this side and on this side.

The COURT.—That is, on the side next to the street? [69]

A. Yes, next to the street, and on the south side it was boarded up all the way with weather strips up and down, vertical boarding on that. There was a roof on it that came down on this side.

Q. On the south side?

A. Yes, on the south side, and on the north side the roof was a little steeper, but not as long as on the south side.

Q. It was a V-shaped roof?

A. No. It isn't a V-shaped roof, but it is more like that (indicating). I don't know just what you would call that, to make it intelligent. But now

(Testimony of Fred Veatch.)

referring back to that first map, this part here in yellow, that frame building was all taken down.

Q. We will get to that later. Just describe this building here.

A. This was boarded down on the north side, I guess, five or six feet from the top; then it was open from there to the ground.

Q. How far is it to the ends of the boards, down to the ground?

A. Oh, I would judge it was 16 feet possibly, 15 or 16 feet, somewhere along there.

Q. Then where this little shed is, over the scales, that is not inclosed in any way, is it?

A. No, sir—just runs from this building right to that.

Q. Just a canopy covering over the scales?

A. Yes, sir, part of the driveway.

Q. Without marking it, just indicate what portion was reached by the fire?

A. Just this part. [70]

Q. That is already marked with ink; a portion around which the ink mark is drawn is the only portion which was reached by the fire?

A. Yes, practically.

The COURT.—It is the only portion involved here. Of course the main building was reached by the fire.

Mr. DAVIS.—Q. There was no vinegar stock damaged in the building?

A. No, none in the main building was damaged.

Q. Now, Mr. Veatch, how many storage tanks or

(Testimony of Fred Veatch.)

vinegar tanks did you have in the main building, in 244?

A. Well, I don't know as we have got any storage tanks in there. We have got a tank right here, on the east side of the brick, where there is one twelve-foot tank which is used as a loading tank, about 7000 gallons. On the north side of the brick part, in the loading room, we have two twelve-foot tanks, a capacity of about 7000 gallons each. Then in the basement of this room here we have what we call our mixing tank, which holds about 6000 gallons. Then we have four receiving tanks that are I think twelve feet in diameter and about five and a half or six feet high, that have a capacity of about four or five thousand gallons each. Then on the third floor we have two small tanks, into which we pump the vinegar when it is to be pasteurized. And then up in the little third story that is built clear on top of this, we have three small tanks there, with a capacity of probably six or seven thousand gallons, in which the vinegar stock is pumped, and from that it flows into the generators by gravity. Our storage room in there is very limited, because we are shifting from one place to the other all the time. [71]

Q. It is just the completed stock that is put out there at the vinegar tank shed?

A. No, sir. Can I explain?

Q. Yes, briefly as you can.

A. Well, of course the wagons come in here and dump here. The apples are dumped there into a

(Testimony of Fred Veatch.)

conveyor and carried up here into a bin, and then we have a grater there and two big hydraulic presses here. The juice is pressed out of these apples and pumped over here into the tanks.

The COURT.—In the tanks in the shed in question?

A. Yes, sir. Then as soon as the fermentation is through, we pump this vinegar stock up into the third story of this building here. From that they go through the generators, and trickle down into the storage tanks in the basement. When they fill up they are pumped out then, these tanks are cleaned, and then re-filled with the finished product.

Q. At the time of the fire what proportion of the stock in the vinegar tank shed there was finished product?

A. It was all finished.

Q. It was all finished product at that time?

A. Yes, sir.

Q. You don't know how much of the stock that you had on hand was in the vinegar tank shed and how much in the factory building, do you?

A. Approximately, yes, sir, because we invoiced immediately. There was about 50,000 in this building, and from about a hundred and thirty here.

Q. A hundred and thirty out in the vinegar tank shed? A. Yes, sir.

Mr. MOORE.—What exhibit is that, Mr. Davis?

(Testimony of Fred Veatch.)

Mr. DAVIS.—That is Plaintiff's Exhibit 3.

Q. Now, Mr. Veatch, to make this matter plain to the Court, the way the rates are applied and the company is advised of what they are insuring,—the company has Sanborn maps in their office in San Francisco, that is true, is it not?

A. I would imagine that that is true, yes, sir.

Q. And they have also the rating schedules in their office? A. I imagine so, yes, sir.

Q. And you, in writing your insurance, refer to the maps and the rating schedules?

A. Yes, sir.

Q. Now, the rating schedule that is in use in Moscow is compiled by the Pacific Board of Fire Underwriters rating department, is that not correct? A. I understand so, yes, sir.

Q. And that service is used by all these companies known as the board companies?

A. Yes, sir.

Q. And both these companies involved here are board companies? A. Yes, sir.

Q. Their rating man surveys the town for fire hazard, and then by their computations arrive at a correct rate to be charged for each risk?

A. Yes, sir.

Q. And then those risks, those rates are promulgated by the board, they are sent out—are they sent direct to you, or do you get yours through the company?

A. I think they are sent direct from the Board of Fire Underwriters. [73]

(Testimony of Fred Veatch.)

Q. And under your contract with the companies you cannot deviate from those specific rates?

A. No, sir.

Q. In Moscow, that space here is a certain building, and you must charge one-fifty on that, and over there is another building, and you must charge two-fifty, and you can't deviate—you must follow those rating schedules exactly? A. Yes.

Q. You have been in the business 30 years?

A. Yes, sir.

Q. You are familiar with the practices of insurance companies and their manner of applying rates? A. Yes, sir.

Q. You are familiar with the rule for applying coinsurance reduced rate average clause?

A. Yes, sir.

Q. And you testified that that was never contemplated, or had never been applied in this risk?

A. No, sir, never.

Q. Now, taking into consideration all those things, and your experience of many years as an insurance man, do you know of any way in which the vinegar tank shed, taking into consideration that rating schedule, and the factory building, 244, could have been written under one coverage in a policy?

A. I think so, under the printed forms that the boards put out.

Q. And following those instructions, do you know of any way that you could arrive at the two risks under one coverage, and still adhere to the in-

(Testimony of Fred Veatch.)

structions and the rates? I believe you testified on the former trial that there was none, [74] did you not? A. That there was what?

Q. That you knew of no way except by the reduced rate average?

A. Yes, the reduced rate average.

Q. That is the only way that they could be covered under one coverage?

A. If they were two buildings that would be true, yes.

Q. Just as the rate stands, a two-fifty rate on the vinegar factory, and a two forty-five rate on the storage shed, applying those rates, there is no way except by using the reduced average clause and applying the higher rate, there is no way by which you could write them under one coverage, is there?

A. I still don't see why the specific insurance that I wrote on there couldn't be written; I still can't grasp that,—as well as the blanket covering.

Q. How would you apply the rates in covering 244 and the building known as 240, how, under one rate, and covering them both, what rate would you use?

Mr. MOORE.—Mr. Davis, I would ask you to reform your question. There was no building known as 240.

Mr. DAVIS.—I will use it in the sense that he used it.

WITNESS.—My impression was that the form that we used on those policies, where it says on

(Testimony of Fred Veatch.)

there, "additions communicating and in contact therewith," cover it.

Q. When you receive these rate books from your company— A. Yes, sir.

Q. —you are supposed to abide by the instructions contained therein. Now, did you bring that rate book that I asked [75] you for?

A. No, sir; but I can send over and get it.

Q. I wish you would. That rate book contains your instructions, does it not, as to how to apply those rates?

A. Yes, sir. If I can't get that one, I can bring my present one, which has the same instructions.

Mr. DAVIS.—I would like to have it now, your Honor.

The COURT.—Can you send for it?

WITNESS.—Yes.

Mr. DAVIS.—Q. Now, when there is a rate, a specific rate, fixed by the Board of Fire Underwriters, which is communicated to you, that is the rate that you must use, is that not correct?

A. Yes, sir.

Q. And that rate applies to the entire risk, does it not?

A. Yes, sir, it is supposed to apply to that entire risk.

Q. And when a rate is fixed identifying a risk, that identifies the specific risk, does it not?

A. It is supposed to, yes, sir.

Q. Now, then, explain how—where you have two rates or two separate risks,—you can write the two,

(Testimony of Fred Veatch.)

the different, the risk, under one coverage, at one separate rate?

A. That rate sheet there that you have in your hand, Mr. Davis, of course, says, next south vinegar tanks. Our heavy values nine or ten months out of the year are in those tanks. And part of the time I carried a certain amount of specific insurance under the two forty-five rate. It is impossible for us to carry an average clause down there, because that vinegar is shifting practically every day from one building to the other, one part of the building to the other; there is no means of bookkeeping that we could put in down there that we [76] could keep track of the vinegar that would be in one part of that building one night and what was there the next night, without making the actual inventory and measurement, and we have always carried a certain amount of specific insurance on those, and as the stock went down we would cancel out on that stuff.

Mr. MOORE.—Under the two forty-five rate?

A. Under the two forty-five rate, yes, sir.

Mr. DAVIS.—Q. Then the insurance that was written which describes 240, was specific on the vinegar tank shed, is that correct?

A. On the contents of the vinegar tanks, yes, sir.

Q. Now, again referring to this word "south" that you speak of. On this rate manual, south, first, southeast corner of Main and "C," 244.

A. Yes, sir.

Q. Then there is "South."

(Testimony of Fred Veatch.)

A. Yes, sir, no number.

Q. Then there is another South 244.

A. Yes, sir.

Q. Is it not a fact that that rate schedule refers to separate risks there, each one separate?

A. I don't understand it so, no, sir.

Q. You did understand it so, though, when you applied, took a two forty-five rate for one and a two-fifty for another, did you not?

A. No, sir, I did not. I understood I could write specific insurance at that rate on that, and then write blanket insurance to cover the—

Q. Does your rate manual tell you what to do in regard to it? [77]

A. I wouldn't be positive. I wouldn't say until I can read it and refresh my memory on it.

Q. Isn't it a fact that if you are using a general coverage, that you must average your rate?

A. I don't understand so.

Q. Or apply for a specific rate for the entire building, from the Board of Fire Underwriters?

A. I don't understand so, no.

Q. Then, Mr. Veatch, let me read this from your testimony in the former trial. I said: "And where there is a rate fixed for a certain risk, that applies to the entire risk?" "I think that is correct. I think there are some exceptions to that rule." "You are referring to the average clause, but you have never used the average clause in writing this particular kind of risk?" "No, sir." "The average clause has no bearing on this particular kind

(Testimony of Fred Veatch.)

of case?" "No, sir." "You identify to your principals the particular insurance you desire, or that you are binding with them, as a single particular risk in all cases? In other words, you never write two separate risks at separate rates, in one policy?" "No, sir." "That cannot be done, according to your rules or the rules of your principals?" "I don't think so. I have never done it, anyhow, or attempted to do it." That was your testimony in the former trial, was it not?

A. Yes, sir, and that is still correct.

Q. That was your belief at that time, and that is your belief now? A. It is my belief now, yes, sir.

Mr. DAVIS.—I think that is all. [78]

Redirect Examination.

(By Mr. MOORE.)

Q. Looking at Plaintiff's Exhibit 3A, tell us how the building which you said contained the press-room is connected with the building known as the vinegar tanks?

A. By a roof from the vinegar tank room which runs over and is tied into the roof on the press-room.

Q. Now, are the tanks in the vinegar tank room, we will call it, or is that building or that addition, is it used in connection with the manufacturing part of the establishment?

A. Absolutely. It is the most important.

Q. How is it used in connection with the manufacturing part of the establishment?

A. First, we store the raw juice in there.

(Testimony of Fred Veatch.)

Q. How is it used? You say you store it. How is the raw juice passed backwards and forwards?

A. Pumped through a hose. We have pumps underneath one of these hydraulic presses, and a two-inch hose attached, which leads over through these tanks, and this juice is pumped into these tanks as fast as it is pressed.

Q. Then, afterwards what further use in the processes, in common with the parts of the building, assuming that there are two parts of the building there?

A. After the fermentation takes place, after the sugar in the juice has been turned to alcohol, then we pump it back through the generators, which converts the alcohol into acetic acid. That goes from the generators into the receiving tanks, and then it is pumped—as fast as these tanks are emptied they are cleaned out, and the finished produce is put in there. [79] Then, as a finished product we pump it back up into the third story, and that which is bottled is pasteurized and filtered. That which is barreled is only filtered.

Q. Where is your shipping-room?

A. On the north side of the brick building, next to the railroad track, on the north side.

Q. Across the manufacturing part of the building north from the vinegar tank shed or room?

A. Yes, sir, next to the extreme, to the line along "C" Street, is the loading room.

Q. What facilities have you for shipping out there?

(Testimony of Fred Veatch.)

A. We have side-tracking in there.

Q. What railroad? A. The Inland.

Q. Tell us how, in what different methods or manners, do you ship the finished product from your plant.

A. We ship it in bottles and barrels, and in tank cars.

Q. Now, does the tank shed, as an addition to the manufacturing plant, or that part of the plant known as the manufacturing buildings and rooms, is it in contact with it?

A. It is joined together, yes, sir, not only with the roof, but it is closed here in front with a gate, which I would judge would be ten feet high, and then there is a gate back here on the alley, and it is all inclosed. There is a tight gate in front, where it opens out on to Main Street.

Q. What about sewerage connections of the building?

A. We are connected with storm sewers on both sides.

Q. Does it carry to one point from the storm sewer, the drainage from each of those buildings, carried to the storm sewer? [80]

A. Yes, sir, through the press-room is a sewer that comes right straight out, and then there is a sewer line that comes down through the center of the tank shed and comes to the same storm sewer out in the alley.

Q. Sewerage that comes from the manufacturing portion of the plant, do you know whether it crosses

(Testimony of Fred Veatch.)

on the surface before going into the sewer proper, does it cross on the surface of this—

A. From the second story here, that water and waste comes down on to this paved driveway, through a concrete trough, out to the center of this tank-room.

Q. And all of the buildings there are connected together or in contact? A. Absolutely.

Q. And all used for the common purpose of manufacturing and transporting vinegar?

A. Yes, sir, absolutely.

Mr. MOORE.—Now, Mr. Davis, do you contend at all for any nonliability on the ground that Mr. Veatch, as agent of the company when writing the policies, agent of the defendant companies when writing the policies, owned an interest in the property insured?

Mr. DAVIS.—Your question is broad. I don't know whether the companies did or did not know. I will not answer your question. I will stipulate this, that whether they knew or not, I don't know, but I will stipulate that the companies knew that Mr. Veatch and Leo Brothers were the same people.

Mr. MOORE.—And that as agent, and while writing the insurance, issuing the policies, as agent of the defendants, they knew that he was interested as a property owner? [81]

Mr. DAVIS.—I will stipulate that they knew that Mr. Veatch and Leo Brothers were practically the same thing.

(Testimony of Fred Veatch.)

Mr. MOORE.—Q. Now, coming back to this specific insurance, you say that your rate book provides for a rate of two forty-five,—that is, two dollars and forty-five cents on the thousand or—

A. \$24.50 a thousand.

Q. Or \$2.45 a hundred? A. Yes, sir.

Q. That the party or authority who has or fixes the schedule of rates has given a special rate of \$2.45 on the contents of the tank shed?

A. On vinegar tanks, it says.

Q. On the vinegar tanks? A. Yes, sir.

Q. The rate on the manufacturing part of the plant is \$2.50. A. Yes, sir.

Q. Now, you say it has been your practice to write specific insurance at \$2.35 and limit it to—or \$2.45—and limit it to the tank sheds, or your fixed number yourself, your arbitrary number of 240, on Main Street? A. Yes, sir.

Q. Now, then, you say it is your understanding, as an agent, and your practice, and has been your practice, to write under the rate fixed—

Mr. DAVIS.—Pardon me. This is pretty broad for redirect examination, your Honor.

The COURT.—Yes. I think the form of the question goes beyond the answers that the witness has heretofore made, and it is, of course, leading.
[82]

Mr. MOORE.—Q. Tell us, then, what your understanding is as to the covering of a policy carrying a rate of \$2.50, upon property described as being in Block 102, No. 244.

(Testimony of Fred Veatch.)

Mr. DAVIS.—I object to that your Honor, as calling for a conclusion. That doesn't call for an expert's opinion as to the manner of applying rates. It calls for a conclusion of law.

Mr. MOORE.—It goes to the question of intent.

Mr. DAVIS.—Yes, but it must be proven by the facts and circumstances.

Mr. MOORE.—He can go as far as to say exactly what his intent was, as an insurer.

Mr. DAVIS.—Not until he shows that the other party heard it and understood it in the same way, or he wouldn't have any contract.

Mr. MOORE.—It also is pertinent to the cross-examination with reference to the average clause, and his understanding.

Mr. DAVIS.—He could testify what is the custom. He can testify as to his knowledge of the insurance rate and the application of rates, but he can't testify as to his understanding of the specific matter, or what intent he had in mind when applying this. That is a fundamental rule, I think.

The COURT.—I think I shall sustain the objection.

Mr. MOORE.—Allow us an exception.

Q. Now, Mr. Veatch, on cross-examination you testified with reference to a compromise or settlement of the claim of Leo Brothers against the London, Liverpool & Globe and the Home Insurance Company, each carrying a policy of \$10,000 upon the vinegar, that, if I remember correctly, that

(Testimony of Fred Veatch.)

your compromise with the adjuster was—was it twenty cents a [83] gallon?

A. Twenty cents a gallon, yes, sir.

Q. Was there any other consideration that entered into that settlement? A. Yes, sir.

Q. What was it?

A. The man who salvaged the vinegar paid us three cents a gallon for loading it out.

Q. What was it worth for loading it out?

A. About a half a cent a gallon.

Q. Who was the man that made the purchase?

A. Mr. Divans, of Seattle.

Q. Under that arrangement what price did you receive for the vinegar?

A. Twenty-three cents.

Mr. MOORE.—Take the witness. I believe that is all.

Recross-examination.

(By Mr. DAVIS.)

Q. Twenty-three cents was the net, was the price that you finally received for your vinegar?

A. Yes, sir.

Q. A gallon? A. Yes, sir.

Q. And that brought your net loss down to \$19,000, as agreed upon at the time? A. Yes, sir.

Q. That is the way you arrived at that?

A. Yes, sir.

Mr. DAVIS.—That is all. [84]

The COURT.—Just a moment, Mr. Veatch.

(Testimony of Fred Veatch.)

(Questions by the COURT.)

Q. How does it happen that you fixed this number 240?

A. If I can have that old map, Judge, I can explain it to you, that 1909, I think it is. Now, as I say, when we started in, we put up a small shed building, and we had, I think—we put up a small shed on the south side of our ground, and put in three tanks only. That shed was boarded up on this side and on this side.

Q. Yes, I understand that. You testified to that in substance before. I mean how did you happen to hit upon the number 240?

A. I figured out the way the city numbered it, about the distance between this number and that number, and I put on there, for my own convenience, the number 240, and inadvertently on one policy which was renewed, which was fritten I think first in 1913 or 1914, that was renewed every year just the same. I used that 240 on my specific insurance, and have done it right straight along, covering the juice, for my own information. And when the stock begins to run down I begin to cancel out my specific insurance as it leaves this tank for the last time, as it is shipped, and I used that 240 merely to keep from looking through my records to show just the specific insurance that I wanted to cancel out.

Q. I notice here on the map the number 224, and this one is 244. A. 244, yes, sir.

Q. Now, if there were buildings put on that block

(Testimony of Fred Veatch.)

in between those two numbers it would be customary to fill in between 224 and two— [85]

A. Yes, sir. They have invariably done it. I can show you probably some differences some place on this map between 1918 and that.

Q. What I was trying to get around to, was how would the companies to whom you made these several reports of the specific insurance upon this building that you refer to as 240, know on what property, what property was covered by those policies? As I understand now, they wouldn't have in their offices your notation of the number. They would simply have this map, which would be, we will assume, uniform all over the country.

A. Yes, sir; it is supposed to be.

Q. Now, when you reported, in the writing of a policy, the number 240, on the east side of Main Street, etc., how would the agency or the principal to whom you sent this report know what property you had intended to cover?

A. Judge, this risk is known as a special hazard, among the insurance people. When a risk of a special hazard is sent in to the company, they immediately make out an inspection slip and send to their special agent who travels these fields. It is his duty. And not only—he receives orders from the company to inspect that property both physically and morally, both for physical hazard and the moral hazard, the first thing they do when they get to that town. So that risk was inspected by

(Testimony of Fred Veatch.)

the special agent of every company that has ever had a line on there since 1911.

Redirect Examination.

(By Mr. MOORE.)

Q. Does this report which you send in to the company, which carries the number, carry the description of the property as [86] being between "A" and "C" Streets on Main Street, between "A" and "C" Streets? A. Absolutely.

Q. Or at the southeast corner of the intersection of Main and "C" Streets?

A. Yes, sir, absolutely.

Q. And does it carry a rate?

A. It carries a rate.

Q. Your report carries the rate?

A. Carries the rate, yes, sir.

Q. Now then, could not the insurer ascertain from your report, if the description of the property in the policy was the same as the description of the property here, then would not the rate indicate what part or portion of the property the risk was upon?

Mr. DAVIS.—That is a conclusion, your Honor. I object.

The COURT.—That is the contention of Mr. Davis with regard to the other policies too, I assume, that is, that the rate—

Mr. MOORE.—Well, I wouldn't say the rate—it is more than descriptive. Of course it is descriptive, but that isn't its only purpose, of course, but

(Testimony of Fred Veatch.)

it would be, that is, the insurer could ascertain, I can see, from the rate that goes in with the report, that if he gets the description as put upon the Sanborn Fire Map, with the rate, and there is a different rate for two different parts of the building, or the entire risk, then they know whether they have got a general covering on the entire building or a special covering for the special rate. [87]

The COURT.—Well, the descriptions, as you sent them in these reports, which refer to policies covering merely these tanks or the vinegar in the tank shed there, the description there, other than the number, is precisely the same description as you inserted in the reports in the other policies?

A. Yes, sir.

The COURT.—Referring to 240.

A. Absolutely, identically the same.

The COURT.—What I was trying to get at is as to how the companies to whom these reports are made would know that you were limiting the policies containing the number 240 to the tank sheds or the contents of the tank sheds.

A. I don't know as there would be any way that they could do that back there until their specials came through; and on the other hand, the values, our values, are in those tanks nine months out of the year.

The COURT.—I understand that. Of course the situation is a little peculiar here because of the fact that the witness acted in a dual capacity. Suppose you had been writing this policy merely as the

(Testimony of Fred Veatch.)

agent of the insurance company, writing these policies as the agent of the insurance companies, for third parties, the owners, how would either the owner or the company know that the coverage of the policy was limited to the tank sheds? I refer to the policy of 240. How would either party be able, in case of loss, to prove that fact, except, of course, by reference to the lead pencil notation which you made upon this plat in your office,—but eliminating that, how would either party be able to identify the property covered? [88]

A. Now, I don't know as I can answer that question, Judge. They would know this from my daily report, I think, on those things, that the rate on those two policies there says line 3.

The COURT.—One other question in that connection. Is there any more reason why the company to which you would make these reports of the 240 coverage could conclude that you didn't intend to cover the main building, as we will call it, than for the company to conclude that 244—

A. If it was the same covering, I don't see how they could tell.

The COURT.—You mean the same rate?

A. No. I mean the same covering, if the forms are the same.

The COURT.—I don't think I made that question clear. Here you make two reports, one of them the 244 policy and one of them the 240 policy.

A. Yes.

(Testimony of Fred Veatch.)

The COURT.—The balance of the descriptive language in the report is identical. A. Yes, sir.

Q. Now, if the company to whom you make the 244 report is under obligation to conclude that the coverage there is of all the property, wouldn't it be, by parity of reasoning, necessary for the company to whom you made the other report, the 240 report, to conclude that that policy covered all of the property?

A. I am satisfied—I may be mistaken about that, but my recollection is that when Mr. Webster first came down, he said if the entire property had been destroyed there would [89] have been no question raised on that at all. Only this one part of that property was destroyed.

The COURT.—But I am referring back to a time before there was any loss at all. I am simply trying to get into my mind how your principal or principals would know what you were doing here, what you were covering by these several policies. Of course, if their plats had carried the two numbers, as yours did by the lead pencil notation, 244 and 240, then it would be quite clear, I think, that the policies would be limited in their coverage to the particular property.

A. I don't think there is any question about that, but I understood this, that the tanks was something that would be pretty hard to burn; they were full of liquid practically all the time, full of water when the vinegar is moved out of them, and for that reason they made a little bit better rate

(Testimony of Fred Veatch.)

on that than they did on the balance of the property. Now, as I say, I can't tell how possibly the companies might have known where it said 240, whether or not that covered 244 or not. I couldn't answer that. But I do know that every risk was inspected by a special agent. Every time a policy was written their special agent came and made a report on that property to their principals.

The COURT.—Can you tell me offhand how much insurance, in the aggregate, you carried specifically upon 240?

A. What we carried on the stock,—we carried \$20,000.

The COURT.—I mean exclusively upon that.

A. Yes, sir.

Q. That didn't go to the balance?

A. That was \$20,000.

The COURT.—\$20,000, that is, exclusive of these policies [90] under consideration here?

A. No. That includes.

The COURT.—You didn't understand me then. What was the aggregate of the insurance you carried with reference to 240?

A. The specific amount?

The COURT.—Yes.

A. \$11,000. No,—\$20,000—\$20,000—\$10,000 in the Liverpool, London & Globe, and \$10,000 in the Home of New York. That was the specific amount.

The COURT.—Those you report as 240?

A. As 240, yes, sir.

(Testimony of Fred Veatch.)

The COURT.—And that you were carrying in July and also in December, 1920, when these two policies under consideration here were written?

A. Yes, sir.

The COURT.—And you continued to carry that?

A. Out stock goes in in November.

The COURT.—How much were you carrying with reference to 244?

A. You mean on just stock or on—

The COURT.—Yes, on stock. A. On stock?

The COURT.—Yes.

A. That would be \$11,000.

The COURT.—Just these two policies?

A. Just these two policies, yes, sir.

The COURT.—These are the only two policies then that you carried on stock, having reference to No. 244?

A. Yes, sir. As I say, our values were in the big tanks all the time, but they are shifting back and forth, and we [91] could never tell which part had the most.

The COURT.—About how much—the maximum, in the way of stock, did you carry in the other building, the main building?

A. It is impossible during the generating season, it is impossible to carry more than twenty-one or two thousand gallons in there. When we get through—

Q. Even at that time you would have unfinished product in there too, wouldn't you?

(Testimony of Fred Veatch.)

A. No. Our stuff had all been generated at the time of this fire.

The COURT.—During the manufacturing season you would have—

A. Unfinished, yes, sir.

The COURT.—You would have some unfinished—

A. Right on the start we had no finished product in there. In November, when we finish up our season, there is nothing in there but vinegar stock. Then as we generate it and manufacture it, then we pump the manufactured product back in there.

The COURT.—I was trying to get the relation or ratio, if I could, between the value of the stock which you would ordinarily have in the main building and that in this tank building, that is, approximately on the average.

A. Fifty thousand gallons would be the most that could be in there at any time, and that would only be after we was through generating, when we could use all our tanks for storage.

The COURT.—That is its total capacity?

A. Yes, sir, in the main building.

The COURT.—You don't know the origin of this rate on this [92] rate sheet for the tanks?

A. No, sir. There has been two rates on that.

The COURT.—I notice this little sheet put in here, this rate sheet, does not give a specific description of the property by numbers. Do any of the rate sheets do that?

A. Yes, sir. I think that does too, Judge, now.

(Testimony of Fred Veatch.)

Mr. MOORE.—Right at the top I think you will find it, the Sanborn map description, block 102.

The COURT.—Yes, but 244 and 240 is what I am—

Mr. MOORE.—240 isn't there. 244 is there, though.

The COURT.—Where is 244? I overlooked that.

WITNESS.—It is right at the top. It says, "Vinegar plant," Judge, 244.

Mr. MOORE.—Vinegar plant.

The COURT.—Well, that is all I desire to ask him.

Mr. MOORE.—I want to ask him a question or two along the line you asked him.

The COURT.—You may do so.

Redirect Examination.

(By Mr. MOORE.)

Q. Assuming now, Mr. Veatch, that you was insuring with the same company \$2000, a general insurance or blanket insurance policy, to cover vinegar in the plant buildings, and you would describe that as 244, with the rate two-fifty, or \$2.50; and you wrote another policy with the same company, that you wanted to make a specific insurance upon vinegar in the tank sheds, at this reduced rate, you would describe that with the same description of the property—

Mr. DAVIS.—I object to the form of the question.

Mr. MOORE.—Let me get the question. [93]

(Testimony of Fred Veatch.)

The COURT.—No. The question is highly leading.

Mr. MOORE.—I hadn't asked him the question. Assuming that he did that, then I was going to ask him to tell us what he did, how it could be determined whether or not the insurance was—

The COURT.—Read the question, Mr. Reporter.
(Question read.)

Mr. MOORE.—Let me start that again.

Q. Assuming, Mr. Veatch, that you write a blanket policy with an insurance company, on vinegar contained in the buildings of the plant, at a rate of \$2.50, you also write a policy for specific insurance upon vinegar in the tank-sheds, at the reduced rate of \$2.45, you make your report to the company covering the same property as described by the Sanborn Fire Map, and in that report you show the rates for the blanket insurance, or the rate, rather, for the blanket insurance and the rate for the specific insurance, how would the company know what property it was insuring under its separate contracts of insurance?

A. The rate book would indicate that.

Mr. MOORE.—That is all.

Recross-examination.

(By Mr. DAVIS.)

Q. Did you in all these cases, in sending in your daily reports, mark on your daily the page and line referred to in the rate book?

A. I should have done it.

(Testimony of Fred Veatch.)

Q. If you did not, you should have done it?

A. Yes, sir.

Q. I notice in one of these dailies here it was not done, [94] but in one of the copies that was furnished it was done. Would that indicate that you had done it in the one sent to the home office and didn't do it—

A. The copy sent to the home office should be identical with the one I kept at my office.

Q. You had no authority to deviate from the rates? A. No, sir.

Q. And you never undertake to do it?

A. No, sir.

Q. And the entire instructions regarding the manner in which you write and the rate you charge are contained in the manual furnished you by the board and your company? A. Yes, sir.

Mr. DAVIS.—I think that is all.

Redirect Examination.

(By Mr. MOORE.)

Q. It has been suggested to me, Mr. Veatch, that I interrupted your answer when you were explaining about this risk being a special hazard and was inspected when the insurance was first written, by the agents of the company. Will you go on and explain that again?

A. Well, I thought I had explained that. That risk is known as a special hazard, and immediately the report goes in to the head office, of a special hazard, they immediately make out an inspection

(Testimony of Fred Veatch.)

slip, and send it to the special agent who has charge of the territory in which that is located.

Q. That is upon the first policy issued, is it?

A. I am inclined to think it is followed up on every policy, whether it is a renewal or whether it is not. I know it has been inspected by practically every special that has [95] come through this country, that has had a line on that plant.

Q. What do they do when they get here?

A. I don't know. They go and make that inspection. They come in the office and locate it on the map and ask what part of the town it is in.

Q. Do they make an inspection of the property itself?

A. Yes, sir. And then they find out who the owners are of that property.

Mr. MOORE.—That is all.

Recross-examination.

(By Mr. DAVIS.)

Q. You don't have anything to do with those inspections, then? A. No, sir, not a thing.

Q. They don't confer with you about it?

A. No, sir not a thing.

The COURT.—There is one thing yet, Mr. Moore, that I don't understand. It is suggested by your questions. You spoke of writing a blanket policy. Now, if the witness can explain, it may be of some help. But how would the company know that he intended to write a blanket policy, as you call it? How would the insurance company, I mean, know

(Testimony of Fred Veatch.)

that he intended that the policy carrying the number 244 should extend to this tank building?

Mr. MOORE.—You are asking me that?

The COURT.—I am suggesting the inquiry to you, in order that you may throw some light upon it by interrogating Mr. Veatch.

Mr. MOORE.—That is what I asked Mr. Veatch,—how the managers of the company would know that one was a blanket [96] policy and that the other was specific insurance.

WITNESS.—Judge, those forms, I don't know how I could make it any plainer than they read themselves.

The COURT.—I don't believe either one of you quite understand the question in my mind. When you send in a report of a policy on 244, how is the company to know that that policy, even though it carries the rate \$2.50, which you have suggested, how is the company to know that it extends to this shed and the contents of this shed?

A. The form of the policy reads, “and its additions, communicating or in contact therewith.”

The COURT.—Isn't that true also of the 240 policy?

A. Yes, sir. The only way they could get at that would be by reference to their rate book. That says, “line 3, tank sheds.”

The COURT.—Then, if the rate is the criterion, a rate of \$2.45 in one case and a rate of \$2.50 in the other, and a policy—two policies come in, with the same description, one carrying \$2.45 and one \$2.50,

(Testimony of Fred Veatch.)

why wouldn't they naturally conclude that one is limited to the property on the corner and the other is limited to the property to the south?

A. I can't—I don't know.

The COURT.—He states that these policies carry the provision, "with the appurtenances, etc." Now, when we get the policy on 240, it also has the appurtenance clause. Why would the company conclude that that policy extended to the building on the corner?

A. Judge, that was absolutely an arbitrary number of my own. There is not one other Sanborn map in the country—it [97] is not used on any other Sanborn map that was ever issued. If there had been any question in the company's mind as to that, they could have very easily found it out. Their specials could have found that out very easily when they were here. That was an arbitrary number. Ordinarily—I don't know—if I use a wrong number on a policy I am what they call "tagged" for it very quickly. They call my attention to it. The Sanborn map and the rate book have never had in it any other number but 244, so far as the insurance records are concerned.

The COURT.—Any further questions,—either side?

Recross-examination.

(By Mr. DAVIS.)

Q. Did you find out, Mr. Veatch, whether or not these were renewals, and did you bring your—

(Testimony of Fred Veatch.)

A. No, sir; I didn't have time to look that up at noon. I can dig that up and come back with it.

Q. Wouldn't these dailies show? One of them says new, on it, and the other gives the same number.

A. Yes, so I can't tell you, but I am inclined to think that both of those are new policies.

Q. Mr. Veatch, you have these rate books, which are your only instructions. Will you find in there any place that authorizes the writing of blanket coverage where there are two specific rates given by the rating bureau?

A. I don't think I could in any limited time. I don't know whether I could at all.

Q. You are not familiar with any such rules as authorize that, anyway? [98] A. No, sir.

Q. Mr. Veatch, now this word, line 3, page 3 of specific rates of Moscow, south, vinegar tanks, rate \$2.40, that doesn't refer to the building, but refers to the occupancy, is that not correct?

A. I have judged it to be, yes, sir.

Q. On the left-hand side all these are buildings; where that says, southeast corner "C" Street, that means the building on the southeast corner of "C" Street, is that not correct? A. Yes, sir.

Q. And where it says south, that means the building just south?

A. Not necessarily. The building south of it is a number.

Q. But if there is no number on the Sanborn map, and there doesn't happen to be a number, they

(Testimony of Joseph M. Kimberling.)

refer to it as south, and that means the building south, does it not? A. Yes.

Mr. DAVIS.—I think that is all, Mr. Veatch.

Mr. MOORE.—That is all.

(Witness excused.) [99]

Testimony of Joseph M. Kimberling, for Plaintiff.

JOSEPH M. KIMBERLING, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. MOORE.)

Q. State your full name.

A. Joseph M. Kimberling.

Q. Where do you live, Mr. Kimberling?

A. Moscow, Idaho.

Q. And how long have you been a resident of Moscow, Idaho? A. Twenty-three years.

Q. What is your occupation or calling?

A. I am a carpenter by trade.

Q. And how long have you followed that occupation?

A. Why, most of the time for about 26 years.

Q. Will you look at Plaintiff's Exhibit 3A, and tell us whether or not you recognize—let me go a little further. This street running with the points of the compass indicated here north and south, and named Main Street, is Main Street, Moscow, and this street running in the opposite direction, east and west, is "C" Street, in Moscow. With that

(Testimony of Joseph M. Kimberling.)

information, do you recognize this portion of the map surrounded by a broad pencil mark, as including the buildings of the Leo Brothers Company vinegar plant? A. I think I do, yes, sir.

Q. Now, I want you to tell the Court how this building on the north side, that runs up to "C" Street, is connected with the building or addition here marked "Vinegar tanks," there where I am indicating.

A. Well, that is connected on Main Street, that is, the [100] street running north and south here, by a large gate, with a heavy track, that works on a track, and there is a heavy post next to the brick building and one next to the tank building, that supports this track for the heavy gate that closes the entrance.

Q. Are those posts nailed to the respective buildings?

A. Yes, sir. They seem to be properly secured there. Then on the rear there is a gate something similar to the one on the front, on the alley. Over this scale platform the roof that protects them, the end of the—the north end of the rafters rests on the main brick building or press-room, as he has it marked here. On this tank building, I would judge down about 16 inches, about that,—I never measured it,—about 16 inches from the plate line of this building, there is a timber spiked to the side of the building on to the posts and braces, and the ends of these rafters over the scale shed rests on this timber. It has been a 2x6; it isn't at the present

(Testimony of Joseph M. Kimberling.)

time; it has been burned. It is a little smaller than that now, I think. Then in the center of this shed, or about the center of it, there is one brace; there is a timber about, oh, I would say 14 inches, I would say, probably, from this one, that is spiked against the side of the building, there is about a 4x4 that rests under the rafters about 14 inches down from the top. Then there is a brace from this post, there is a 6x6 post in this shed about the center of the scale platform. This short brace runs from this post under this 4x6 or 4x4,—I guess it is a 4x4, and that is the only brace supporting that, any more than this 2x6 spiked up against the side of the building. Then on the platform, at the platform, rather, of [101] the scale, there is a timber that comes through under the scale or from the scale platform, and is fastened to this post at the bottom, or about two feet above the ground, I would judge it to be, and that is about the way those two buildings are connected.

Q. How is the scale platform connected on its north side to the building, if at all?

A. You mean to the brick building?

Q. Well, it isn't brick. It is the other addition.

A. It is marked "Press-room" here?

Q. Yes.

A. I guess that isn't brick. This scale platform runs right up and is joined to this press-room building.

Q. What is the condition of this roof? Which

(Testimony of Joseph M. Kimberling.)

way does the roof over the scale platform slope or run the water? A. It slopes to the north.

Q. From the tank shed to the press-room?

A. Yes, it runs to the north.

Q. How is the roof composition proper run together there—in a gutter, or is there a break in the composition?

A. There is a gutter, if I remember right, that empties the water off, it would be to the east.

Q. Where does the water go that runs off of the north side of the roof over the tank-shed immediately south of the room over the scales platform?

A. I don't believe I get that question.

Q. Where does the water run that falls upon the north side of the roof over the tank-shed? What kind of a roof is it on the tank-shed?

A. Well, it is what we term a gable roof, one rafter. I [102] think the south is a little bit longer than the one on the north, so it doesn't make this gable directly in the center of this building.

Q. But the water runs both ways—south and north? A. Yes, sir.

Q. Where does the water run that runs off of the building immediately south of the scales platform?

A. It falls on to this concrete driveway.

Q. Immediately south of the scales. This is south, isn't it?

A. Oh, yes. I get your question now. It runs and drops off on the south side of the shed.

Q. No, you don't understand me yet. The water that falls on the north side of the roof of the tank

(Testimony of Joseph M. Kimberling.)

building immediately south of the roof of the scale shed.

A. It runs down on to this scale roof, and then empties down into this gutter and comes off to the east.

Q. What about any sewer connection or service or sewer for the flowage of surface water out in this space south of the brick portion of the building, north of the tank-shed?

A. Well, the water that empties off of this building on to this platform, this concrete driveway, and somewhere about the center of this space,—I don't know whether it is just the center or not,—but there is a drainage, concrete trough, I would call it,—first there is a catch-basin on this concrete driveway in here somewhere, probably, I will say, 18 inches square,—it possibly is a little smaller or larger—about that—there is a catch-basin there, that the flow that runs off of these buildings or accumulates on this concrete driveway doesn't run into the sewer. It flows in this catch [103] basin and out in the sewer somewhere in the tank-shed, in a concrete trough.

Q. Then, the water falling off of the north side of the tank-shed on to the concrete in the alley, and that falling off of the south side of the brick building and the press-room, that flows on to that concrete, flows off through the tank-shed or into the tank-shed, into the sewer?

A. I judge it does, yes, sir, from the looks of the—

(Testimony of Joseph M. Kimberling.)

Mr. MOORE.—Take the witness.

Cross-examination.

(By Mr. DAVIS.)

Q. What is the space between the two buildings?

A. Well, I didn't measure it. I would judge it to be—

Q. Fifteen or sixteen feet, is that about approximately correct?

A. I would judge it to be sixteen feet.

Q. About how wide is the concrete driveway? That isn't the full width, is it? A. No, sir.

Q. And to the south, along the tank-shed, there is quite a little piece of dirt, little stretch of dirt, is there not, three or four or seven feet, between the south edge of the concrete and the tank building?

A. I believe there is a small space,—I couldn't say just how much, between this concrete and the main posts of the tank-shed.

Q. The tank-shed is open on the north except as the boards come down for a short distance from the top, and then it is all open? A. Yes, sir. [104]

Q. And the canopy over the scales is not included at all, it is just a roof over the scales?

A. That is all.

Q. And it is tied about the same on either side, so far as permanency is concerned?

A. Well, I would judge it to be, yes.

Mr. DAVIS.—I think that is all.

Q. (By the COURT.) How many stories are there to the press-room there, sir,—just one story or two or three?

(Testimony of Fred Veatch.)

A. I believe it to be only a one-story building, I believe it to be.

Mr. DAVIS.—That is all.

Mr. MOORE.—That is all, Mr. Kimberling. Mr. Veatch, will you take the stand for another question?

Mr. DAVIS.—Pardon me, Mr. Moore. You never had this marked as admitted. I know you want it in.

Mr. MOORE.—I think it is marked admitted on the inside. I intended to offer only page 4.

(Witness excused.) [105]

Testimony of Fred Veatch, for Plaintiff (Recalled).

FRED VEATCH, heretofore duly sworn as a witness in behalf of plaintiff, upon being recalled, testified as follows:

Direct Examination.

(By Mr. MOORE.)

Q. Mr. Veatch, is there any reason for not boarding up or inclosing this tank-shed on the north and the east?

A. Yes, sir. There is all kind of reasons for it.

Q. Will you name some of them?

A. Well, we have got to have quick access to that. There is three openings from the other building on the outside, but that side of the tank we have to take our hose through in there, we have to take lumber in there for making the tops. We have to change those occasionally. The acetic acid

(Testimony of Fred Veatch.)

eats the nails out of the tops about every two years, and we couldn't work in there if that north side was closed up tight.

Q. Explain why, now. What would be the result if that was closed up, with the accumulation of acetic acid in there. Is it acetic acid that accumulates there?

A. Yes, sir. It would eat the rods off of the tanks very rapidly.

Q. Could one work in there if it was all closed up?

A. Unless it was air-tight. If it was air-tight you couldn't but just an ordinary building you could.

Q. The main thing is to give a circulation there?

A. A circulation of air. Your iron hoops would go to pieces every two or three years if they were confined in there.

Q. In the process of making vinegar?

A. Yes, sir. [106]

Mr. MOORE.—That is all.

Mr. DAVIS.—That is all, Mr. Veatch.

Mr. MOORE.—That is the plaintiff's case.

(Plaintiff rested.)

Mr. DAVIS.—The plaintiff having rested, your Honor, the defendant moves the Court to enter judgment for the defendant, upon plaintiff's own case, that he is not entitled to recover. There are matters which I wish to argue in brief.

The COURT.—I think I will not entertain argu-

(Testimony of John K. Wooley.)

ment unless you are willing to stand upon the motion.

Mr. DAVIS.—All I have is just an expert here. He just stepped out in the hall. If we can wait a few minutes. Mr. Webster might take the stand and give us his testimony as to—

The COURT.—Do you want your motion disposed of now?

Mr. DAVIS.—No. The Court didn't want to hear argument. [107]

Testimony of John K. Wooley, for Defendants.

JOHN K. WOOLEY, produced as a witness in behalf of defendants, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. DAVIS.)

Q. What is your name? A. John K. Wooley.

Q. How old are you? A. Thirty-two.

Q. What is your business or profession?

A. I am deputy assistant manager of the Washington Surveying and Rating Bureau.

Q. And what is your business? Describe it.

A. We make the fire insurance rates for the State of Washington.

Q. Do you make the rates or survey?

A. We survey the property and promulgate the insurance rates.

Q. Were you employed in that capacity at any time in the State of Idaho?

(Testimony of John K. Wooley.)

A. Yes. I was surveyor for the Board of Fire Underwriters of the Pacific, with headquarters at Salt Lake, from 1908 to 1918.

Q. Did you survey the town of Moscow at any time?

A. In 1917 I rated the town of Moscow.

Q. How long have you been in the rating business? A. Since 1908.

Q. That is a technical following?

A. In most of its respects.

Q. Now just explain to the Court briefly the operation of the rating bureau, or your Pacific Board rating bureau, and the manner in which you adopt and promulgate rates, and the manner [108] in which the companies and their agents are advised. Maybe I can shorten it by asking you first of all, what is the Pacific Board?

A. The Pacific Board is an association of fire insurance companies, for the purpose of maintaining certain rates.

Q. And the department sends out surveys and surveys the towns, and then you apply your knowledge of fire hazards to the risks as you find them?

A. Yes, sir.

Q. And arrive at an equitable rate, in your estimation, and that rate is then published by the board, and the companies who are members adopt it?

A. They are furnished with the sheets, as are also the local agents in the respective towns.

Q. Now, for example, when the city of Moscow has been surveyed and your fire hazards applied

(Testimony of John K. Wooley.)

and the rate arrived at and promulgated, the agent has the same—is furnished with the same as his principal, in San Francisco or New York, or wherever the principal happens to be, wherever the agent happens to report? A. Yes, sir.

Q. And the agent—are you sufficiently familiar to answer this question? The agent is bound by his instructions as to rates and the manner in which he writes and—

Mr. MOORE.—I want to examine him on that before he answers that question, or makes the objection that he isn't qualified.

Mr. DAVIS.—I think I will withdraw it anyway. Mr. Veatch answered it. I am just repeating here. [109]

Q. Now, in surveying the town of Moscow, did you have occasion to survey the Leo Brothers plant? A. I did.

Q. And did you compute the rate that was to be charged to that plant?

A. I made the rate in 1917.

Q. Do you know whether or not the physical aspects of the plant have been changed any?

A. So far as I know—I know the relative distance between the two buildings is the same, because my survey shows a distance of 17 feet intervening between the two risks.

Q. You looked that up recently, did you?

A. I was forwarded the survey that I made. It was sent from the Salt Lake office.

(Testimony of John K. Wooley.)

Q. Now, just briefly explain. The rate on this building is \$2.50. The rate on this vinegar tank is \$2.45. Here is another building, this building here. Just explain your application of the principles of insurance rating.

Mr. MOORE.—I object to that as immaterial. There is nothing to be gained by knowing what makes the hazard, or what makes the rate. If he is simply interpreting the rate book, I shall object to that because he hasn't shown himself qualified to do that. He is the man who finds the hazard and fixes the necessary rate, but so far as that rate book, made up somewhere else, is a notice to the insurance company, he hasn't qualified himself yet to say.

The COURT.—I don't know just what he is going to say to you. I will let him go along a little while.

Mr. DAVIS.—Q. Have you had experience in the home office of insurance companies? [110]

A. Not in the insurance companies. I have been in the rating bureau.

Q. And how long have you been in the rating bureau? A. Since 1908.

Q. Do you know as a matter of fact whether or not the rates as promulgated by the Board of Underwriters are furnished to the home office or the general agencies of the companies who are members, as well as to the agents?

A. They are, absolutely.

(Testimony of John K. Wooley.)

Q. And when you made your rate on the Leo Brothers factory and sent in your report, was that report printed and sent both to the companies and to the—your final analysis of that report was printed and sent both to the companies and the agents?

Mr. MOORE.—Just a moment. What department of the insurance work prints these rate books,—the insurance department or the rating bureau?

A. Well, you are mixing two organizations, I am afraid.

Mr. MOORE.—I don't want to.

A. The rate bureau is a rating bureau; it makes the rates and has them printed. Whether that happens to be a part of their own office or business or—

Mr. MOORE.—As a rating bureau, you fix and prepare the rate books? A. Yes, sir.

Mr. MOORE.—And then deliver them to the companies and the Underwriters' Board?

A. Yes.

Mr. MOORE.—That is as far as you go,—and make that delivery? A. Yes, sir. [111]

Mr. MOORE.—That is all.

A. That is as far as the office goes until the agent writes the fire insurance policy. Then the copy of the daily report has to pass through that examining department of the rating bureau for approval as to form and rate, before it can be filed on the company's permanent file.

(Testimony of John K. Wooley.)

Mr. DAVIS.—Q. Now, Mr. Wooley, just refer to Defendant's Exhibit 7, and referring also to the—this is Defendant's Exhibit No. 7, and I think Plaintiff's Exhibit 3,—and to the portion that has been marked and re-marked here, and explain what—line 2 there, the southeast "C," southeast "C," capital "C," does that refer to the southeast corner of Main and "C"?

A. It refers to the southeast corner of Main and "C," because this is the street on which it is located, Main Street, and this is the corner of the intersection, the southeast corner of Main and "C," but between "C" and "A" Streets.

Q. Just below that line "C" it says "south."

A. That means the building next south to the one on the corner.

Q. Further over here, in line 2, it says "Vinegar factory," and line 3, it says, "Vinegar tanks."

A. That is merely a description of the occupancy.

Q. Then when a daily report is described as southeast corner of Main and "C," or referring to line 2, page 3 of the rate book, does that refer to what particular portion of this risk described in Exhibit 3, does that refer to?

A. Only to the vinegar factory.

Q. And on this map what portion is the vinegar factory, as applying to that rate? [112]

A. Merely the building designated 244, as shown on Sanborn's map, located on the southeast corner.

Q. Does it not refer to the building south of it?

A. No, because that is specifically rated.

(Testimony of John K. Wooley.)

Q. Is that a matter of instructions given in your rate book?

Mr. MOORE.—That is not the best evidence.

The COURT.—Sustained.

Mr. DAVIS.—I will ask you to mark this.

Certain papers were marked as Defendant's Exhibit 18 and 19.

Q. I hand you Defendant's Exhibit No. 19 and 18, 18 and 19,—state what they are. What is 18, first?

A. No. 18 is the book of general estimates, basis rates, which is provided to the agents in the field, so that they can write a risk which may not be specifically rated, pending the authorization of a specific rate by the bureau. The ruling section determines the writing of the policy form. The book of rules in here explains how the policy form can or cannot be issued.

Q. That is in this Exhibit 18?

A. Exhibit 18. Exhibit 19 is the book in which the specific rates are promulgated after inspection by representatives of the bureau.

Q. When a specific rate has been promulgated, are the agents or companies or members of the board authorized to adopt any other rate?

A. Absolutely not. The rule is provided in the book.

Q. Read the rule that—

The COURT.—That is admitted by Mr. Veatch, is it not?

Mr. DAVIS.—Yes, I believe that is.

(Testimony of John K. Wooley.)

Q. Now, referring to the specific rates at Moscow, and your [113] rules as promulgated there, tell me whether or not, where there are two risks specifically and separately rated, such as line 2 and line 3 of this book, whether it is possible, and to conform to the rules of the company, for an agent to write both those risks under one coverage, at one rate?

A. In the first place, the book of specific rates states that the specific rates in the book applied to the different risks are subject to the rules as provided for under the other book. In the other book it states that insurance may be issued only covering a specific amount on building, a specific amount on machinery, tools and fixtures, a specific amount on stock in the building. Other than that, in order to write insurance on two or more buildings which may be specifically rated, it is necessary to adopt either the average distribution clause or the ninety per cent reduced rate average clause, which is accepted for blanket purposes in lieu of the average distribution clause.

Q. Now, in other words, the only way that you can write insurance under those conditions is by using the reduced rate average or the coinsurance clause? A. And the highest rate applicable.

Q. You have to use all three of those to make a blanket coverage, and if they are not used there could not be a blanket coverage, according to the rules?

(Testimony of John K. Wooley.)

A. There could not be a blanket coverage.

Mr. DAVIS.—That is all.

Cross-examination.

(By Mr. MOORE.)

Q. Will you turn to page 4 of that exhibit. Tell us now where the property described in that insurance policy is located. [114]

A. It says all—

Q. No. Just tell us. Show us on this map.

A. 244.

Q. Down here,—take this into consideration—where is it? A. Limited to 244.

Q. 244-D?

A. Well, that is,—for instance you call this the front portion of your main building, and this part in the rear is an addition. It would include that.

Q. Don't "D" mean south?

A. Absolutely not. That is a separate building, which has been rated as such.

Q. Here in your rate sheet No. 3 south "D" vinegar tanks.

A. Oh, no. 244 is the vinegar factory.

Q. But the next line right below it, 244-D, vinegar tank.

A. But it is not referred to here.

Q. How is it referred to down there, 244-D?

A. It isn't referred to at all.

Q. What do you call that right there, 244-D?

A. "D" stands for most anything. "D" stands for framed construction. There is no "D" on the map at all.

(Testimony of John K. Wooley.)

Q. Then the "D" don't control?

A. It has nothing to do with it, that I can see.

Q. Then the 244 controls, does it?

A. Absolutely.

Q. If this is all one building, the 244 controls the—

A. It isn't all one building.

Q. Why isn't it one building?

A. Because there is no street number on it. Your mail is [115] probably delivered all in one building.

Q. That is the only reason then—there is no post-office number on it? A. Probably so.

Q. Don't you know the postoffice department don't put the street numbers on the streets?

A. I don't know who puts it on. In referring to street numbers we refer to the numbers that are there for mail delivery or whatever they are on there for.

Q. So you had nothing to do with fixing that number there?

A. Oh, no. We took it because it was there. If we had used another number it would have been conflicting.

Mr. MOORE.—That is all.

Redirect Examination.

(By Mr. DAVIS.)

Q. You had nothing to do with making the map?

A. Absolutely not.

Q. And when you find a building that you consider a separate hazard, that you consider should

(Testimony of John K. Wooley.)

be rated separately from another building, and don't find a number on it, how do you designate it?

A. Either by "next south" or "next rear" or "next north" or "next east" or "next west."

Q. For example, away down at the lower end of this Plaintiff's Exhibit No. 7,—I see it is line 30,—it says "Aj rear."

A. That is adjoining rear. It is considered two buildings.

Q. Although it has no Sanborn map, it is considered—

The COURT.—What does the letter "D" mean?

[116] A. It means frame construction.

Q. What does "C" mean?

A. It means brick or other masonry construction, probably concrete block. There are so many different kinds of—A brick building with a shingle roof is "C" class, for instance.

The COURT.—"D" is used at the bottom of the policy there.

A. Somebody put it on there, I don't know why. It has no bearing on the description of the risk, except that it is frame building. So is the other one. The other is brick and frame, so it is probably classified as "CD," although I didn't notice. "D" merely means frame construction, which includes brick veneered, and also it is a construction inferior to masonry.

Mr. DAVIS.—That is all.

(Testimony of John K. Wooley.)

Recross-examination.

(By Mr. MOORE.)

Q. Then "D" on the policy has no effect on the description at all? A. Absolutely not.

Q. How do you number stables and barns in connection with a—

A. Either by the rear or giving it a half number, or saying "on the assured's property and located in the rear, dwellings on such and such.

Mr. MOORE.—That is all.

Mr. DAVIS.—That is all.

(Witness excused.) [117]

Testimony of Fred Veatch, for Plaintiff (Recalled in Rebuttal).

FRED VEATCH, a witness heretofore duly sworn in behalf of plaintiff, upon being recalled in rebuttal, testified as follows:

Direct Examination.

(By Mr. MOORE.)

Q. Mr. Veatch, were you present when the claim of Leo Brothers Company vs. The London, Liverpool & Globe of London, England, and the Home Insurance Company, under those policies, covering this particular vinegar, was settled and closed in the office of the Veatch Realty Company?

A. Yes, sir, I was.

Q. Do you remember as a circumstance that the purchaser of the vinegar at that time, Mr. Divan, and yourself came to my office? A. Yes, sir.

(Testimony of Fred Veatch.)

Q. Had the claim been settled and compromised or closed at that time?

A. No, sir, it had not.

Q. Do you remember as a circumstance that we went back to the office of the Veatch Realty Company? A. Yes, sir.

Q. Did you hear me make a statement to Mr. Webster that Leo Brothers Company would take 20 cents for the vinegar, providing Mr. Divan got the vinegar? A. Yes, sir, absolutely.

Q. Now, were you called upon to make supplementary proofs under the policies—how many policies did the Home have? A. Two.

Q. And the Liverpool & London & Globe Insurance Company? [118] A. Had one.

Q. Were you called upon by Mr. Webster, as adjuster for those two companies, to sign supplementary proofs? A. Yes, sir.

Q. Did he send those supplementary proofs here for you to sign? A. Yes, sir.

Q. Did you keep copies of them?

A. I had my stenographer make copies of them, yes, sir.

Q. Look at Plaintiff's Exhibit 15 and tell us whether or not that is a copy of the supplementary proof of loss that Mr. Webster asked you to sign in making that settlement?

A. Yes, sir, that is supposed to be a copy of the proof of loss.

Mr. MOORE.—I offer it in evidence.

Mr. DAVIS.—I object to it as immaterial, and

(Testimony of Fred Veatch.)

not a proper proof of loss. Mr. Webster said that on all these the word "compromise" was written. It certainly isn't proper rebuttal.

The COURT.—They may go in.

Mr. MOORE.—Q. Look at Plaintiff's Exhibit 16 and Exhibit 17, and tell us whether or not those two exhibits are copies of the supplemental proofs of loss that Mr. Webster submitted to you for your signature, in the settlement of the claim under the Home policies?

A. Yes, sir, I suppose they are copies of the—

Mr. MOORE.—I offer these in evidence also.

Mr. DAVIS.—I object that they are immaterial, your Honor, and they haven't accounted for the absence of the original. [119]

Mr. MOORE.—Q. Mr. Veatch, have you any invoices showing the prices of vinegar here in Moscow and its immediate vicinity, preceding and shortly following the 6th day of July, 1921?

A. I have my office copies, carbon copies of the invoices.

Q. That shows the prices of the vinegar that you were selling it at? A. Yes, sir.

Q. Prices vinegar was selling at—will you produce them?

(Witness produced papers.)

Mr. MOORE.—Maybe I had better have them marked for identification.

Q. What are the papers, Mr. Veatch, that you have just handed me?

(Testimony of Fred Veatch.)

A. They are copies of invoices of vinegar which we shipped, around near the 6th of July.

Mr. MOORE.—Will you fasten those all together and mark them for identification.

Said copies of invoices were fastened together and marked as Plaintiff's Ex. 20.

Q. Will you look at Plaintiff's Exhibit 20 for identification, and tell us what periods of time those invoices cover?

Mr. DAVIS.—It isn't proper rebuttal, your Honor.

The COURT.—Yes, I think so. Overruled. I suppose they are offered to rebut the testimony of Mr. Riley.

Mr. MOORE.—Yes, sir.

A. They are for a period of time running from about June 16th, June 17th, June 22d, June 24th, June 29th, July 1st, July 15th, July 16th, July the 15th, July 16th, and July the first. I have got another one there. [120]

Mr. MOORE.—We offer them in evidence, to be marked the proper exhibit.

The COURT.—Were those invoices of current sales or of preceding contracts?

A. Current sales, Judge. I would say that in the spring of 1921, it was practically, on account of financial conditions, practically impossible to make future contracts.

The COURT.—What I mean, the sales were made at about the time of these invoices?

(Testimony of Fred Veatch.)

A. Yes, sir. Just the orders were put in just at the time the invoices were made.

Mr. DAVIS.—I have no objection.

Mr. MOORE.—I am going to ask the witness to read these invoices and explain them.

The COURT.—You want just the price? Give the amount, date and price.

WITNESS.—Not to whom, not to where they went?

The COURT.—No, I don't think that is necessary, that is, if the sale was made on board the cars here.

WITNESS.—Yes, sir; this is all f. o. b. Moscow. This included cooperage, Judge, which that year run from six cents a gallon on second cooperage, and seven cents a gallon for new cooperage. Most of this was second-hand cooperage. I could pretty near pick it out as I went through if it made any difference. But here is two barrels that went to Kahlotus, Washington, on the order of the National Grocery Company, of Seattle, at 23 cents a gallon, f. o. b. Moscow.

The COURT.—What day?

A. That was July 1st. On July 15th, an invoice to the Lewiston Mercantile Company, which went to Genessee, Winona, [121] St. Johns, Hoy, Washington, Lenore, Idaho, Juliaetta, Idaho, Culdesac, Idaho, Grangeville, Idaho, at 23 cents.

Q. Just a moment before you proceed further. What grain or what percentage of acidity was this?

A. This was all 40 grain vinegar.

(Testimony of Fred Veatch.)

Q. Or four per cent acidity?

A. Yes. Or here is one exception,—I think possibly two exceptions. On July 18th, a shipment for the Lewiston Mercantile Company, to Leland, to Nez Perce, and one to a—no, that was bottled goods,—at 23 cents. On July 13th, I think that is, 15 barrels of 60 grain vinegar, shipped to Spokane, Washington, to the Inland Products Company, at 24 cents, f. o. b. Moscow. Then we are charged there with 15 new barrels, at three-fifty apiece. On July 1st a shipment for the Lewiston Mercantile Company, to Uniontown, Washington, to Genesee, Idaho, Winchester, Idaho, Troy, Idaho, Cottonwood, Idaho, and Grangeville, Idaho, at 23 cents. There are some 45. The first three barrels in that was 45; that went at 25 cents. On June 29th, some more 45 went to Colfax, and Palouse, Washington, Leland, Idaho, Pomeroy, Washington, Grangeville and Rubens, Idaho, for the Lewiston Mercantile Company, at 23 cents. On June 24th, 12 barrels of 60 grain vinegar to the Inland Products Company at Spokane, barrels furnished by the purchaser, at 24 cents for the naked juice.

Q. You say that shipment was to Spokane?

A. To Spokane. There is two shipments in there. And another shipment to Spokane on June 17th, to the Inland Products Company, 12 barrels of 60 grain, Leo brand, at 24 cents for the naked juice, barrels furnished by the buyer. Then on June 16th, there was stuff shipped in Moscow,

(Testimony of Fred Veatch.)

Idaho, [122] Colton, Grangeville, at 23 cents, 40 grain.

Mr. MOORE.—That is all.

Cross-examination.

(By Mr. DAVIS.)

Q. These were all retail sales?

A. Yes, sir. We hadn't started to shipping any carload stuff.

Mr. MOORE.—Does this indicate—

A. Gallons.

Mr. MOORE.—Where is your grade indicated,—40 gr.? A. Yes.

Mr. MOORE.—The grain,—you say there is two cents different for each half per cent acidity?

A. Yes, sir.

Mr. MOORE.—Really ten cents difference between 40 grain and 65? A. Yes.

Mr. DAVIS.—On this third sheet there is one, two, three, four sheets, I notice you have a shipment to the Inland Products Company, Spokane, Washington, July 18, 13, 767 gallons, 15 barrels 60 grain Leo, price 24 cents. A. Yes, sir.

Q. That is—

A. I wish to say in that connection that I have shipped them a good deal of 60 grain vinegar to keep up their generators up to strength, and I make them a special price.

Q. Better than the average retail price?

A. Yes, sir.

Mr. DAVIS.—I think that is all, Mr. Veatch.

Mr. MOORE.—That is all. That is our case.
[123]

Mr. DAVIS.—The defendant rests, your Honor.

I am not quite familiar with the practice where the case is tried without a jury, but the defendant asks the Court to make findings in favor of the defendant, special findings, finding facts in favor of the defendant, and asks leave to present proposed findings. But at no time thereafter did the defendants request or suggest findings, either in their briefs, or petition for rehearing, or otherwise, nor did they ever present a desired or proposed finding upon any point or issue or remind the Court of the foregoing suggestion made in the course of the trial.

The COURT.—Do you desire to argue the matter now, Gentlemen?

Mr. MOORE.—Why, I can briefly state our position. We haven't the authorities here. I haven't any brief formulated. I can get the authorities perhaps collated in a day or so. I wouldn't like to be limited at this time to this presentation. I don't think there is much of a question of fact here for the Court to determine.

(Further argument by Mr. Moore, Mr. Davis, Mr. Moore and Mr. Davis, respectively.)

The COURT.—I shall be assisted by cases closely in point, if any such there be, as to the facts. I am very sure that the mere physical connection of the buildings is not a controlling—it is a material consideration, of course, but not a controlling one, because you would not contend that the policies

number 240 would carry the building on the corner. It is well known that the same buildings are often put up in sections and different policies are carried on different sections of the building. It is all one structure physically, and of course that is always a consideration. But I shall have to consider this in the light of all the circumstances, and it seems to me it may be rather a perplexing question when we get into it, just what the agreement was. [124]

The Court thereupon took the consideration of the law and facts of said causes under advisement and thereafter, after briefs filed by counsel for both parties, rendered an opinion in writing in which the Court concluded that judgment should be entered for plaintiff against both defendants, and thereafter upon request of defendants further considered said cause and thereafter on the 19th day of September, 1922, rendered further opinion in writing in favor of plaintiff, and on said date signed and caused to be entered judgment for plaintiff in said cause. Defendants thereafter and on the 7th day of October, 1922, presented its exceptions to said decision and the entry of said judgment on the grounds that there was no evidence to support said decision or judgment.

Now, in furtherance of justice and that right may be done, defendant presents the foregoing as its bill of exceptions in this cause and prays that the same may be allowed, signed and certified by the Judge as provided by law and filed as a bill of exceptions herein, and that the exhibits, index of which is hereafter attached, be made part thereof

and that the Clerk of the court be ordered and instructed to attach said exhibits to said bill of exceptions.

E. EUGENE DAVIS,
Spokane, Washington,
ORLAND & LEE,
Moscow, Idaho,
Attorneys for Defendants. [125]

Certificate of Settlement of Bill of Exceptions.

It appearing to the Court that the foregoing bill of exceptions contains all the material facts occurring in the trial of said causes, including the rulings of the Court, together with the exceptions thereto taken and allowed and all material matters and things occurring upon said trial, except the exhibits introduced in evidence which are hereby made a part of the bill of exceptions, and the clerk of this court is hereby ordered to attach said exhibits thereto.

NOW, THEREFORE, upon motion of defendants' attorneys, it is **HEREBY ORDERED** that said proposed bill of exceptions with the amendments allowed by this Court be and the same is hereby settled as a true bill of exceptions in said causes and the same is hereby certified accordingly by the undersigned, Judge of this court who presided at the trial of said causes, as a true, full and correct bill of exceptions, and the clerk of this court is hereby ordered to file the same as a record in said causes and in due time transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

October 21, 1922.

FRANK S. DIETRICH,
District Judge.

[Endorsed]: Lodged Oct. 23, 1922. Filed Oct. 27, 1922. W. D. McReynolds, Clerk. [126]

In the District Court of the United States for the
District of Idaho, Central Division.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

THE NEW BRUNSWICK FIRE INSURANCE
COMPANY, a Corporation,
Defendant,

and

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

NORWICH UNION FIRE INSURANCE SO-
CIETY, LIMITED, a Corporation,
Defendant.

Opinion.

August 17th, 1922.

FRANK L. MOORE, Attorney for Plaintiff.

ORLAND & LEE, E. EUGENE DAVIS, Attor-
neys for Defendants.

DIETRICH, District Judge.

The real issue in these cases appears to be one of

fact rather than of law. Legal rules and principles, of course, are to be applied, but touching these there is little room for controversy. In the main elementary they pertain largely to the construction of contracts, and such questions as they incidentally present relate not to their definition and scope but to their application to the facts. It is hardly necessary to say that if a contract is plain and specific there is no need for construction, and hence the surrounding circumstances are immaterial. If upon the other hand, [127] it is indefinite or ambiguous or incomplete, such circumstances may be resorted to for light upon the unexpressed intent of the parties. And a contemporaneous construction joined in by the parties will control the scope and meaning of an instrument.

The loss claimed in each of the two suits is for vinegar or vinegar stock injured by fire while in the tanks of the plaintiff in its tank-shed, in block 102, on the east side of Main Street, Moscow, Idaho, between "A" and "C" Streets; and the question is whether by their descriptive clauses the policies reached to this shed. Consideration of the question is complicated by the fact that in executing and delivering the policies one Fred Veatch acted for both parties. That is, the New Brunswick policy he signed in person, as the agent of the insurance company, and in the other case the signing agent was Veatch Realty Company, of which he was the manager. At the same time he was the owner of most of the stock in and was the active manager of the plaintiff company. Neither

party repudiates the contracts upon this account, but as will appear in the course of the discussion, the fact is not without an indirect bearing upon the point at issue.

The New Brunswick policy is for \$6000.00, and bears date July, 28, 1920. The Norwich is for \$5000.00, and is dated December 21st, 1920. Immaterial phraseology omitted, and with certain transpositions for the sake of brevity, the coverage of the former can be stated as follows:

“On merchandise of every description consisting principally of cider vinegar, manufactured or in process of manufacture, and on materials” etc.; “all only while contained in the three story comp. roof, brick & one story frame building and its additions (if any) of like construction, communicating and in contact therewith,” “situate No. 244 on the southeast corner of Main and ‘C’ Streets, in Moscow, Idaho.”

At the bottom of the policy, after the date line, and to the left of the signature of the insurer’s agent are the following notations, under the printed heading “Insurance Map”: “Sheet 4, [128] Block 102, No. 244—(D),” the words “sheet,” “block” and “No.” being printed. The “D” after 244 is apparently a clerical error, and is without significance.

The coverage in the other policy is not substantially different. Instead of the word “cider vinegar” it describes the property as “vinegar and vinegar stock”; the words “one story” before

“frame” are omitted, and the situation of the property is given as “at No. 244 on the east side of Main Street between “A” and “C” Streets in Moscow, Idaho.” The notations on the bottom are the same, except that the letter “D,” already referred to, is not added to the figures 244.

It being conceded by all parties that the descriptions are in substance the same, no comment upon the differences in phraseology is necessary. It is further conceded that the calls “block 102, Main Street, ‘A’ Street, and ‘C’ Street” refer to the Moscow townsite plat, and that 244 has reference to a standard insurance map of Moscow, known as the “Sanborn Map,” copy of which was in Veatch’s hands as insurance agent, and which was commonly used as the basis for writing insurance, making rate sheets, and for reports and communications between the various insurance companies and their agents.

Upon the city plat, block 102 is bounded on the north by “C” Street, on the south by “A” Street (there being no “B” Street) and on the west by Main Street. In the northwest corner of this block was the plaintiff’s vinegar factory, adjacent to “C” Street and fronting on Main. What may be denominated the main building, consisting of a brick unit and various frame units integrally connected, fully covered a rectangular section of the block along “C” Street, extending in length from Main on the front back to an alley running north and south through the block. To the south of this and toward the rear was a small scale-shed, reached by

a driveway from Main Street between the principal structure and the tank-shed. Then the tank-shed, rectangular in shape, abutting on Main Street and in length extending about four-fifths [129] of the distance back to the alley, the rear end being on a line with the rear of the scale-shed. The scale-shed formed the link by which structurally the tank-shed and main building were connected; a gate along the Main Street front also made a slight physical connection between the two structures at that point. All parts of the structure were undoubtedly used by the plaintiff as a single plant for the manufacture, storage, and sale of its vinegar products. Other than the driveway, which was closed by a gate, there was but one entrance to the building and that was into the factory proper from Main Street.

Upon this statement of the facts and nothing else, admittedly there would be little, if any, room for doubt that the coverage of the policies extended to the vinegar in the tank-shed, as well as to the vinegar in the main structure. The shed was a part of the plant, and if not an integral part of the main building still was in a very real sense an addition thereto, "of like construction, communicating and in contact therewith."

But there are certain other features of the case which, when considered in the light of the dual agency exercised by Veatch in the issuance of the policies, the defendants contend should be taken as implying an understanding by the parties or a construction of the policies by them, limiting the cover-

age thereof to vinegar contained in the main building. As has already been observed, the descriptive words "No. 244" in both policies refer to the Sanborn insurance map, with which, of course, Veatch was familiar. The notation at the bottom "Sheet 4," was doubtless intended as a reference to the current folio of these maps, turning to which we find on sheet 4 an insurance diagram of block 102, as well as of other property in Moscow. And in the space representing Main Street, opposite the plaintiff's main building, and near the front line thereof, are the figures 244. There is no corresponding number in front of the tank-sheds, and further south, opposite the livery-stable on the same block, we find the next number 224. Obviously these circumstances are in themselves [130] of little significance. The fact that on the map the descriptive number contained in the policies is not opposite all parts of the connecting structures constituting a single manufacturing plant, or is at one point on the map rather than another, does not import an intent to have the contract extend only to a part of the plant. So that if we were to confine our consideration of coverage to the descriptive clauses of the policies, including, of course, plats and maps referred to therein, the defendants would still have but little footing for their defense.

But to give significance to the fact that 244 is opposite the main building and not the tank shed, they divert attention to other circumstances, and to these we may now briefly refer. Under the general practice prevailing in insurance circles, upon writ-

ing these policies it became Veatch's duty to report the fact to the companies concerned, upon standard printed forms provided for that purpose, called daily reports. Standard forms of policies having been used, upon receiving such reports the home offices or general agent of the companies could with the data thus furnished readily construct a copy of the policy as written, and if it did not conform to the general rules, or was erroneous in any respect, they could intelligently direct correction or make cancellation. Daily reports were sent in by Veatch, and upon their face it was shown, in accordance with the fact, that the rate upon which the insurance was written was 2.50 per hundred. But it appears that at that time, upon a printed rate sheet prepared by the Underwriters Association and in the hands of all insurance agents, including Veatch, there were separate rates for the vinegar factory proper and the tank-sheds. The printed sheet (about 4x6") upon which this rating is found, is entitled "correction sheet No. 35, April 1st, 1920, Main Street—East Side—Moscow—P—3", and, in so far as pertinent, is as follows: [131]

| No. of Rating | Location | Class | Occupation | Bldg. Conts. | Rating Takes Effect |
|------------------|---------------------------|-------|-----------------|-----------------|---------------------------|
| 1 | C and A Streets—Block 102 | | | | |
| 2 | SE c C (244) | C-D | Vinegar Factory | 250 250 | |
| 3 | South | D | Vinegar Tanks | 245 245 | 10-15-19 |
| 4 | South (244) | D | *Warehouse | 340 340 | 4-1-20 |

It will thus be noted that the policies were written upon the rate prescribed for the factory proper, and not that of the tank-shed. In his report of the

Norwich policy, in the blanks left for that purpose Veatch specified, by appropriate entries, page and line of the rate sheet, the same being line two as above set out. On the New Brunswick report no entries were made in the blanks. It further appears that upon the Sanborn map in his possession Veatch had made a lead pencil notation "No. 240," opposite the tank-shed, and had taken out policies containing this number as a part of the description, such policies admittedly being limited in their coverage to this structure and its contents. The rate in such policies was 2.45, as called for by line three of the rate-book. There is nothing to show, however, that prior to the fire, by which the loss here in question was occasioned, either of the defendants had knowledge that such notation was on Veatch's map, or that he had written the policies referred to as covering the tank-shed alone. While, therefore, these circumstances may be taken as possibly shedding light upon Veatch's intent, they could have had no influence upon the defendants in acquiescing in the policies and thus accepting them, upon the coming in of Veatch's daily reports. By these reports, as already suggested, the home offices of the defendants were in effect given copies of the policies as written, and hence the information upon which they acted was such as was disclosed in the policies, their copy of the Sanborn map, possibly the townsite plat, the rate sheets, with reference to which they necessarily assumed the policies were written, and the current book of insurance rules in their hands and in the hands of all their agents, in

conformity with which rules they also had [132] the right to assume Veatch had written the policies. With this information and in the light of all the facts and circumstances, upon what basis probably, did the minds of the parties meet? It is, of course, not a question of reforming the policies but of putting upon them the construction which the parties themselves put upon them at the time, and it is to be conceded the case is different from one where the insured and the insurer have dealt with each other at arms' length. In the ordinary case where the property owner seeks insurance at an insurance agency, there are no surrounding circumstances to throw light upon the meaning of the contract and no opportunity for contemporaneous construction by the parties. The policy is issued by the company and its agent, and under elementary rules if there is an ambiguity it is construed favorably to the insured. But here Veatch while agent of the defendants was not only agent for, but in a sense was the insured; he had a large financial interest in it. Under such circumstances it may be doubted whether the policies became effective until they were reported to and approved by other agencies of the defendants. They were so reported and impliedly approved. But such approval was upon the information given by Veatch in his daily reports, and by reason of his relation to and interest in the insured, his familiarity with insurance practices, and his possession of insurance maps, rules and rate sheets, it is thought the plaintiff is bound by the construction he put upon the coverage features of

the policies, provided, of course, the defendants accepted and acted upon such construction. And from the conduct of the parties and all of the facts and surrounding circumstances, we are to determine what such construction was.

As has already been observed, taken literally the language of the policies, when applied to the physical facts concerning which there can be no controversy, clearly covers the loss. The vinegar stock was in a structure communicating and physically in contact with the building which was admittedly covered by the policy, and the two units, belonging to the same owner, were thus [133] parts of a single structure, and were used together in carrying on a single business. While some of the circumstances thus far referred to as being relied upon by the defendants to establish the intent of Veatch, and the understanding of the defendants that the coverage was limited to the main structure, may be regarded as pointing to such a construction, taken as a whole they are not thought to be conclusive or sufficient to warrant us in so limiting the natural import of the language of the policies having directly to do with coverage. The fact that certain policies were carried upon the contents of the tank-shed alone, and that for convenience in writing and handling these policies Veatch assigned to the tank-shed an arbitrary number, falls short of proving that the owner could not or under other circumstances would not take out blanket insurance on the entire plant; whatever the facts may be the explanation given by Veatch of the reasons for using

the number 240 are not wanting in plausibility. And the rate charged on the policies in controversy, together with the reference in one of the daily reports to the rate sheet, while suggestive of the main building alone, does not necessarily signify an intent to exclude the tank-shed, unless, under the rules, that rate is applicable only to the main building and should not be used in a coverage of the entire plant. And that brings us to a very serious, if not the controlling, consideration. At the hearing I understood it to be the defendant's contention that the rules expressly forbade the general coverage here contended for by the plaintiff under a single rate; in the briefs the position does not seem to be so confidently maintained. Rule 20-(A) prohibits "a blanket policy, covering under one sum separate or distinct risks or items of hazard." But for the defendants to invoke this provision is only to beg the question. Physically, at least, the vinegar and vinegar stock was not necessarily made up of distinct lots or items. In the course of manufacture and putting its product upon the market, it was necessary for the plaintiff from time to time, more or less continuously, to move the vinegar stock or [134] vinegar from one part of the plant to another, and the whole stock might very well be considered an entirety. Immediately following the rule under consideration there are stated concrete examples which would seem to make it clear that the prohibition does not, in spirit, apply to a case of this character. It is there said that a single policy may cover under one sum merchandise contained in

warehouses, elevators, canneries, packing-houses and wineries, and on their adjoining platforms or in cars alongside or within three hundred feet thereof.

Furthermore, there are found among defendants tariff rules the following:

NO. 3 BRICK AND FRAME BUILDINGS.

When insuring a B or C class building, which has a frame addition (below the roof) specify a separate amount on such addition and its contents; charging on the B or C class portion and contents, the proper B or C class rate. Such frame addition (when occupied by the same person or firm) need not be considered as an exposure to the main building according to the "Tables of Exposure." Unless such specifications are made, charge the D class rate on the whole risk.

NO. 5 FRAME BUILDINGS WITH COMPARTMENTS.

Each compartment for occupancy on the ground floor, of a D class building having more than one such compartment shall be rated as a separate building, if provided with a separate entrance from the street. A D class building, however, having two or more such ground floor compartments may be insured in a single sum, at the rate of the highest rated compartment of such building. This highest rate shall also be the rate for all the contents contained in two or more compartments of the building above the ground floor, when such contents are insured in a single sum. A lumber, wood or coal yard

shall be classed as a D class building, and all the rules applying to a D class building apply also to a lumber, wood or coal yard.

Under these provisions it would seem to be entirely practicable and proper to insure under one sum a plant or structure having several structural units or compartments, provided the highest rate fixed for any one of the units is charged; and that is precisely what was done in this case.

To recapitulate, by reason of its connection in structure and use with the main building, the tank-shed is covered by the descriptive terms of the policy. Under the practice and rules of the defendant companies it was possible to insure the main [135] building and tank-shed separately or they could be covered under one sum in a single policy. Some of Veatch's acts, it must be conceded, are equivocal, but none is incapable of reconciliation with the theory of blanket coverage. As to the defendant companies there is no direct evidence of their intent, and while possibly they may have accepted the policies with the understanding of restricted coverage, we would scarcely be warranted in indulging such a presumption. The case being in that posture we must give effect to the letter of the contracts, which, as we have seen, clearly extends to the contents of the tank-shed. And if we have correctly construed the defendants' insurance rules, the conclusion would not seem to be harsh or result in injustice to them, for in that view, if the policies had been written and reported with a coverage expressly including all of plaintiff's vinegar

stock in both the main building and the tank-shed, presumably they would have been approved as a matter of course. The premium paid being upon the highest rate fixed for any unit or compartment, a single coverage was ruleable, and there is no apparent reason why approval would have been withheld.

The pleadings present an issue touching the amount of the loss, and there was some evidence upon the point; it has been but little discussed and I shall not undertake to review the testimony in detail. The plaintiff's testimony was to the effect that there was in the tank-shed at the time of the fire 129,650 gallons of vinegar, and there is no evidence to the contrary. Upon the conflicting testimony as to market price, I am inclined to think 20 cents a gallon a fair estimate. Upon that basis the gross value of the vinegar in stock was \$25,930.00. It was not destroyed but only injured by the fire and the conceded salvage was \$6369.00 leaving a net loss of \$19,561.00. (As a coincidence, I have found after making the foregoing computation and referring to some notes made at the trial, that this is the basis upon which plaintiff made settlement with other companies.) There was co-insurance of \$20,000.00 or an aggregate of \$31,000.00 altogether. Making [136] the necessary computation, we find that the Norwich share of the loss is \$3,155.00 and the New Brunswick \$3,786.00. Accordingly judgments will be given for said amounts together with interest thereon at the rate of seven

per cent per annum from October 29, 1921, to the date of the judgment. Costs to plaintiff.

Let judgments be prepared by counsel for plaintiff.

U. S. District Court, District of Idaho. Filed Aug. 18, 1922. W. D. McReynolds, Clerk. [137]

In the District Court of the United States for the
District of Idaho, Central Division.

Nos. 784 and 785.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

THE NEW BRUNSWICK FIRE INSURANCE
COMPANY, a Corporation,
Defendant,

and

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

NORWICH UNION FIRE INSURANCE SO-
CIETY, LIMITED, a Corporation,
Defendant.

**Motion to Suspend Entry of Judgment and for
Rehearing.**

Come now defendants and move the Court to withhold and suspend the signing and entry of judg-

ment herein, and to grant defendants a rehearing herein.

Dated this 31st day of August, 1922.

ORLAND & LEE,

Moscow, Idaho.

E. EUGENE DAVIS,

Spokane, Wn.,

Attorneys for Defendants

U. S. District Court, District of Idaho. Filed
Aug. 31, 1922. W. D. McReynolds, Clerk. [138]

In the District Court of the United States for the
District of Idaho, Central Division.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

THE NEW BRUNSWICK FIRE INSURANCE
COMPANY, a Corporation,
Defendant,

and

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

NORWICH UNION FIRE INSURANCE SO-
CIETY, LIMITED, a Corporation,
Defendant.

Memorandum upon Defendants' Motion for Re-hearing.

Sept. 19, 1922.

FRANK L. MOORE, Attorney for Plaintiff.

ORLAND & LEE and E. EUGENE DAVIS,
Attorneys for Defendants.

DIETRICH, District Judge:

Without fully considering whether or not such a motion as the defendants here present is permissible under the practice prevailing where a jury trial has been waived, I entertain the motion and dispose of it upon its merits. To refresh my recollection of the testimony, I have again gone over the record, but I find in it no substantial reason for changing the conclusions heretofore reached. The first contention urged is based upon the assumption that the number 244 refers exclusively to the factory proper, and excludes the tank-sheds. But such an assumption begs the question. If it were not for Veatch's [139] relation to the parties and his conduct with respect to other transactions as well as those here involved, the record would leave no question that the number covers the entire plant, including the tank-sheds. No other number was carried on the accredited insurance plat, and if, as we have found, the tank-sheds were physically connected with the factory proper and the whole constituted a single plant, there would be no more reason for excluding from the coverage of number 244 the tank-sheds than some

other unit of the plant. In other words, if the defendants had been advised that the coverage of policies written in their name was number 244, at the corner of Main Street and C Street, their natural conclusion would have been that it covered the entire plant, including the tank-sheds. The doubt injected into the cases arises not out of facts known to the defendant companies, but because of the use by Veatch, in writing some other policies, of another number to identify the vinegar-tanks—a number, however, not upon the Sanborn map and unknown to the defendants.

The other principal contention is that the rules quoted in the original decision from the defendants' Exhibit 18, are applicable only in cases where there has not been a specific rating of the property. Apart from the testimony of the witness Wooley, called by the defendants, there is no basis of fact in the record for this contention, and it is not competent for a subordinate agent of a litigant to define the purpose and scope of a book of rules apparently of general application. If the defendants had so limited the use of these rules, there should be some record of such action; the insured cannot be bound by a mere opinion given at the trial as to the scope of the rules. And in reason there would seem to be little basis for such an attempted limitation. If under these rules local agents have the authority to write a blanket policy, in what manner and why are they divested of that authority after specific ratings have been made by an agent especially appointed for the

purpose? [140] If such a policy is not objectionable before the special ratings, I am unable to see why it should be outlawed afterwards. The actual conditions remain the same, and the risk or risks continue to be the same, and hence, if there is any substantial reason why the underwriters would decline to accept a blanket policy upon such a risk, it is strange that they would authorize local agents to make the blanket rating but would not authorize specially assigned agents to make it. The discussion need not be prolonged. If, before these policies were written, the question had been put, whether, under the rules as printed and the other data in the record, it would be proper to write them with the blanket coverage contended for by the plaintiff, I would have had no hesitation in answering the question in the affirmative. The mere fact that the witness Veatch was not able when upon the witness-stand to point out under just what provisions of the rules the policies were permissible, is not conclusive. He seemed to be quite positive that such policies could be written.

Upon kindred points I am not at all sure that I can clarify or add to the statement of my views contained in the original opinion. Counsel reiterate the statement that two distinct risks cannot be carried under the same coverage. The proposition may be conceded. But the inference which is drawn from it is based upon an assumption that there were here two distinct risks. As we have seen, from a physical standpoint, the whole vinegar plant was an entirety, a single structure, and

it was owned by a single owner and used for a single purpose. Inherently, therefore, it was in its form and attributes a single risk, just as clearly as the structures referred to in number five of the printed rules set forth in full in the original opinion. The entire plant had but a single entrance, and upon the official insurance plat it was designated by a single number. True, the parties might, by mutual agreement, divide the entire plant up and carry the different portions as distinct risks. Hence the question as treated in the original opinion still is, [141] whether there was such a mutual agreement. While the conduct of Veatch may in some respects be regarded as equivocal, and while upon the whole the question may not be entirely free from doubt, I have given the entire record full consideration, and I find no reason for altering the conclusion stated in the original opinion. The motion will therefore be denied.

U. S. District Court, District of Idaho. Filed Sep. 19, 1922. W. D. McReynolds, Clerk. [142]

(Title of Court and Cause.)

784.

Judgment.

This cause came on regularly for trial on the 19th day of May, A. D. 1922, and the plaintiff appearing by Frank L. Moore, its counsel of record, and the defendant appearing by its counsel of record, E.

Eugene Davis, Esq., and Orland & Lee, and a trial by a jury having been expressly waived by the respective parties by written stipulation filed with the clerk of the above-entitled court, the cause was tried before the Court sitting without a jury; whereupon witnesses on the part of plaintiff and defendant was duly sworn and examined and documentary evidence was introduced by the respective parties, and the evidence being closed, the cause was submitted to the Court for consideration and decision, and after due deliberation thereon, the Court files its findings and decision in writing, and orders that judgment be entered herein in accordance therewith in favor of the plaintiff.

WHEREFORE, by reason of the law and the findings aforesaid, it is ordered, adjudged and decreed that the plaintiff, Leo Brothers Company, a corporation, do have and recover of and from the defendant, Norwich Union Fire Insurance Society, Limited, a corporation, the sum of Three Thousand Three Hundred Fifty-one Dollars (\$3351.00), and for plaintiff's costs and disbursements herein expended, taxed at \$20.55.

Dated this 19th day of September, 1922.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed Sept. 19, 1922. W. D. McReynolds, Clerk. [143]

In the District Court of the United States for the
District of Idaho, Central Division.

No. 784.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

NORWICH UNION FIRE INSURANCE SO-
CIETY, LTD., OF NORWICH AND LON-
DON, ENGLAND, a Corporation,
Defendant.

Exceptions of Defendant.

Comes now defendant and excepts to the de-
cision of the Court in the entry of judgment here-
in, for the reason that there is no evidence to
support said decision and judgment and said de-
cision and judgment are against the law and the
facts in the case.

Defendant further excepts to the Court's fail-
ure and refusal to make findings and enter judg-
ment for defendant herein.

E. EUGENE DAVIS,
Spokane, Washington.
ORLAND & LEE,
Moscow, Idaho.

Attorneys for Defendant.

Service of the foregoing admitted this 9th day
of October, 1922.

FRANK L. MOORE,
Attorney for Plaintiff.

U. S. District Court, District of Idaho. Filed
Oct. 16, 1922. W. D. McReynolds, Clerk. [144]

In the District Court of the United States, Cen-
tral Division, District of Idaho.

No. 784.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

NORWICH UNION FIRE INSURANCE SO-
CIETY, LIMITED, OF NORWICH AND
LONDON, ENGLAND, a Corporation,
Defendant.

Petition for New Trial.

Comes now defendant and petitions the Court
to vacate judgment herein and grant defendant a
new trial, upon the following grounds:

I.

Insufficiency of the evidence to justify a de-
cision and judgment and that said decision and
judgment are against law.

II.

Error in law occurring at the trial.

This application is made upon the pleadings
herein consisting of plaintiff's complaint and de-
fendant's answer and the judgment herein, and
upon the minutes of the Court which shall include
the clerk's minutes and any notes and memo-
randum which may have been kept by the Judge

and also reporter's transcript of his shorthand notes of the evidence introduced.

Defendant specifies the following particulars wherein the evidence is insufficient to justify the decision or sustain the judgment:

(a) The evidence is insufficient and there is no evidence to establish in any manner, or tend to establish any liability on the part of the defendant, as insurer, for the loss of the property in question.

(b) The evidence is insufficient and there is no evidence to establish any contract of insurance with defendant covering the property destroyed by fire. [145]

(c) The evidence is insufficient and there is no evidence to sustain a decision that the property destroyed by fire was included within the description of the property insured by the contract in question.

(d) The evidence is insufficient and there is no evidence to establish, or tend to establish, the fact that the property destroyed by fire was located, situated or contained in the building described in said contract of insurance as located at #244 on the east side of Main Street between A and C Streets in Moscow, Idaho.

(e) The evidence is insufficient and there is no evidence to establish, or tend to establish, the fact that the property destroyed by fire was located, situated or contained in the building described in said contract of insurance as located in Block 102, #244 Sanborn's fire map of Moscow, Idaho.

(f) The evidence is insufficient and there is no evidence to establish the fact that the property destroyed by fire was the property agreed to be insured by the contract of the parties.

(g) The evidence is insufficient and there is no evidence to establish, or tend to establish, the fact that the property destroyed by fire was situated or located in any building agreed upon between the parties as the building wherein the insured property was to be located.

(h) The evidence is insufficient and there is no evidence to establish, or tend to establish, the fact that on account of the destruction of any property belonging to plaintiff this defendant became, or is liable to, or is owing plaintiff the sum of \$3351.00, or any other sum.

(i) The evidence is insufficient and there is no evidence to establish, or tend to establish, that defendant agreed to insure any property located or contained in the building used as storage for vinegar-tanks and their contents. [146]

(j) The evidence is insufficient and there is no evidence or disputed questions of fact upon which the finding or decision can be based to establish, or tend to establish, that defendant ever entered into any contract of insurance with plaintiff to insure it against the loss of the property destroyed.

(k) The evidence is insufficient to justify the decision and judgment in that the evidence shows without dispute, that the parties to the contract of insurance agreed that the building referred to as

the factory proper and the building referred to as the vinegar tank-sheds were two separate and distinct risks and two separate and distinct subjects of insurance.

(1) The decision and judgment is against law in that there is no fact or inference therefrom to support the finding that the property destroyed by fire was included within any contract of insurance entered into between plaintiff and defendant.

Defendant specifies the following particular errors of law relied upon:

The Court erred in construing the agreement of the parties as a contract for the insurance of the contents of the building referred to as the vinegar tank-shed.

The Court erred in denying defendant's motion for judgment at the close of plaintiff's case.

The Court erred in refusing to make findings in favor of defendant as requested at the close of the entire case.

The Court erred in deciding the issues in favor of plaintiff.

The Court erred in entering judgment in favor of plaintiff.

E. EUGENE DAVIS,
Spokane, Washington,
WM. E. LEE,
Moscow, Idaho,
Attorneys for Defendant.

Due and legal service of the foregoing petition for new trial, by receipt of true copy, admitted this 10th day of Oct. 1922.

FRANK L. MOORE,
Attorney for Plaintiff.

U. S. District Court, District of Idaho. Filed
Oct. 16, 1922. W. D. McReynolds, Clerk. [147]

In the District Court of the United States for the
District of Idaho, Central Division.

No. 784.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

NORWICH UNION FIRE INSURANCE SO-
CIETY, a Corporation.

Defendant.

Order Denying New Trial.

Defendant's petition for new trial having been submitted by written stipulation, upon consideration,

IT IS ORDERED that said petition be and the same is hereby denied.

Dated this 19th day of June, 1923.

FRANK S. DIETRICH,
Judge.

U. S. District Court, District of Idaho. Filed
Jun. 19, 1923. W. D. McReynolds, Clerk. [148]

In the District Court of the United States, Central Division, District of Idaho.

No. 784.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

NORWICH UNION FIRE INSURANCE SOCIETY, LIMITED, OF NORWICH AND LONDON, ENGLAND, a Corporation,
Defendant.

Petition for Writ of Error.

The defendant, Norwich Union Fire Insurance Society of Norwich and London, England, a corporation, feeling itself aggrieved by the decision and judgment entered thereon in the above-entitled cause, comes now, by its attorneys, and petitions this Honorable Court and the Honorable Frank S. Dietrich, Judge thereof, for an order allowing it to prosecute a writ of error to the Honorable United States Circuit Court of Appeals, for the Ninth Circuit, under and in accordance to the laws of the United States in that behalf made and approved and also that an order be made fixing the amount of security which the defendant shall give, and furnish upon said writ of error, and that the judgment heretofore rendered be superseded and stayed pending the determination

of said cause in the Honorable Circuit Court of Appeals.

C. J. ORLAND,

Moscow, Idaho,

E. EUGENE DAVIS,

Spokane, Wn.,

Attorneys for Defendant.

U. S. District Court, District of Idaho. Filed
Aug. 17, 1923. W. D. McReynolds, Clerk. [149]

In the District Court of the United States, Central
Division, District of Idaho.

No. 784.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

NORWICH UNION FIRE INSURANCE SO-
CIETY, LIMITED, OF NORWICH AND
LONDON, ENGLAND, a Corporation,
Defendant.

Assignments of Error.

Comes now the above-named defendant by its at-
torneys, and files the following assignments of
error upon which it will rely upon its prosecu-
tion of writ of error in the above-entitled cause
from that certain judgment made by this Honorable
Court on the 19th day of September, 1922:

I.

That the United States District Court for the

District of Idaho erred in deciding that the property destroyed by fire was insured under the policy of insurance sued on in the plaintiffs' complaint.

II.

That the United States District Court for the District of Idaho erred in denying the defendant's motion for judgment at the close of plaintiff's case.

III.

That the United States District Court for the District of Idaho erred in denying defendant's motion for judgment at the close of the entire case.

IV.

That the United States District Court for the District of Idaho erred in refusing to make findings for defendant as requested at the close of the entire case. [150]

V.

That the United States District Court for the District of Idaho erred in entering judgment for plaintiff in any sum.

VI.

That the United States District Court for the District of Idaho erred in deciding that there was any evidence or inference therefrom that the property destroyed was located or contained in the building described in the policy sued on as Block 102, No. 244, Sanborn Map.

VII.

That the United States District Court for the District of Idaho erred in construing the agreement of the parties as a contract of insurance of the contents of the building known as "Vinegar Tank Shed" referred to as Risk 240.

VIII.

That the United States District Court for the District of Idaho erred in deciding that the building the contents of which were destroyed, was the same building or part thereof, as the building known and described as No. 244, Block 102, Sanborn Map.

IX.

That the United States District Court for the District of Idaho erred in not deciding that the two buildings were separate and distinct risks and that the building and contents destroyed were not insured under the contract of insurance sued on in plaintiff's complaint.

C. J. ORLAND,

Moscow, Idaho.

E. EUGENE DAVIS,

Spokane, Wn.,

Attorneys for Defendant (Plaintiff in Error).

U. S. District Court, District of Idaho. Filed Aug. 17, 1923. W. D. McReynolds Clerk. [151]

In the District Court of the United States Central Division, District of Idaho.

No. 784.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

NORWICH UNION FIRE INSURANCE SOCIETY, LIMITED, OF NORWICH AND LONDON, ENGLAND, a Corporation,
Defendants.

Order Allowing Writ of Error.

Upon motion of E. Eugene Davis and C. J. Orland for the above-named defendant, and upon filing a petition for a writ of error and assignment of errors as required by law, it is hereby

ORDERED that a writ of error be and the same is hereby allowed to have reviewed in the Honorable United States Circuit Court of Appeals for the Ninth Circuit the judgment entered herein; and it is further ordered that the amount of bond on said writ of error is hereby fixed at the sum of Five Hundred (\$500.00) Dollars, to be given by the defendant.

IN WITNESS WHEREOF the above order is granted and allowed this 18th day of August, 1923.

FRANK S. DIETRICH,

Judge.

U. S. District Court, District of Idaho. Filed Aug. 18, 1923. W. D. McReynolds, Clerk. [152]

In the District Court of the United States, Central Division, District of Idaho.

No. 784.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

NORWICH UNION FIRE INSURANCE SOCIETY, LIMITED, OF NORWICH AND LONDON, ENGLAND, a Corporation,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, Norwich Union Fire Insurance Society, Limited, a corporation, as principal, and United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland and authorized to transact business as surety in the State of Idaho, are held and firmly bound unto Leo Brothers Company, plaintiff in the above action, in the sum of Five Hundred Dollars, for which sum well and truly to be paid to said Leo Brothers Company, its successors or assigns, we bind ourselves, our and each of our successors and assigns jointly and severally, firmly by these presents.

Sealed with our seals and dated this 5th day of September, A. D. 1923.

The condition of this obligation is such that whereas, the above-named defendant, Norwich Union Fire Insurance Society, Limited, a corporation, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause made and entered by the District Court of the United States for the District of Idaho, Central Division, and

WHEREAS, the said Norwich Union Fire Insurance Society, Limited, a corporation, desires to supersede said judgment and stay the issuance of execution thereon pending the determination [153] of said cause in the said United States Circuit Court of Appeals for the Ninth Circuit;

NOW, THEREFORE, the condition of this obligation is such that if the above-named Norwich Union Fire Insurance Society, Limited, a corporation, shall prosecute said writ of error to effect and pay all necessary costs and damages awarded against it, including the full amount of said judgment and interests, if it shall fail to make good its plea, then this obligation shall be void, else to remain in full force and virtue.

NORWICH UNION FIRE INSURANCE
SOCIETY, LIMITED.

By E. EUGENE DAVIS,

Its Attorney.

Approved this 5th day of September, A. D. 1923.

FRANK S. DIETRICH,

Judge.

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY.

By HENRY WHITSON,

Attorney-in-Fact.

U. S. District Court, District of Idaho. Filed
Aug. 18, 1923. W. D. McReynolds, Clerk. [154]

In the District Court of the United States, Central
Division, District of Idaho.

No. 784.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

NORWICH UNION FIRE INSURANCE SO-
CIETY, LIMITED, OF NORWICH AND
LONDON, ENGLAND, a Corporation,
Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States to the Honor-
able; the Judge of the District Court of the
United States for the District of Idaho, North-
ern Division, GREETING:

Because in the records and proceedings, as also
in the rendition of the judgment, of a plea which
is in the said District Court before you, or some
of you, between the Norwich Union Fire Insurance
Society, Limited, plaintiff in error and Leo Bro-
thers Company, defendant in error, a manifest error
hath happened to the great damage of the said
Norwich Union Fire Insurance Society, Limited, a
corporation, the plaintiff as by its petition herein
appears:

That being willing that error, if any hath hap-
pened, should be duly corrected and full and speedy
justice be done to the parties aforesaid, in this be-

half do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco in the State of California within thirty days from the date hereof, in the said Circuit Court of Appeals, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause to be done further therein to correct that error, what of right and according to law and [155] customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, and the seal of this Court this 5th day of Sept., in the year of our Lord one thousand nine hundred and twenty-three.

[Seal]

W. D. McREYNOLDS,
Clerk of the District Court of the United States
for the District of Idaho, Northern Division.

Allowed by

FRANK S. DIETRICH,
District Judge.

U. S. District Court, District of Idaho. Filed
Sept. 5, 1923. W. D. McReynolds, Clerk. [156]

In the District Court of the United States, Central
Division, District of Idaho.

No. 784.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

NORWICH UNION FIRE INSURANCE SO-
CIETY, LIMITED, OF NORWICH AND
LONDON, ENGLAND, a Corporation,
Defendant.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States of America to
Leo Brothers Company, Defendant in Error,
GREETINGS:

You are cited and admonished to be and appear
in the United States Circuit Court of Appeals for
the Ninth Circuit at the courtroom of said court
in the city of San Francisco and State of California,
within thirty days from the date of this citation,
pursuant to a writ of error on file in the clerk's
office of the District Court of the United States
in and for the District of Idaho, Central Division,
wherein the Norwich Union Fire Insurance So-
ciety, Limited, a corporation, is plaintiff in error,
and Leo Brothers Company is defendant in error,
to show cause, if any there be, why the judgment
in said writ of error mentioned should not be cor-

rected and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM H. TAFT, Chief Justice of the United States, this 5th day of September, 1923.

FRANK S. DIETRICH,

United States District Judge.

[Seal] Attest: W. D. McREYNOLDS,
Clerk.

Service of the foregoing Citation admitted and a true copy thereof received this 18th day of September, 1923, all other service and return hereby waived.

FRANK L. MOORE,

Attorney for Plaintiff.

U. S. District Court, District of Idaho. Sep. 22, 1923. W. D. McReynolds, Clerk. M. Franklin, Deputy. [157]

In the District Court of the Second Judicial District of the State of Idaho, in and for Latah County.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

THE NEW BRUNSWICK FIRE INSURANCE
COMPANY, a Corporation,
Defendant.

Complaint.

Comes now the above-named plaintiff, and for cause of action against the defendant, alleges:

I.

That at all the times herein mentioned the plaintiff has been and now is a corporation organized under the laws of the State of Idaho with its principal place of business and head office in Moscow, Latah County, Idaho, and has been and now is engaged in the operation of a cider and vinegar plant and has been and now is manufacturing cider and vinegar, at Moscow, Idaho.

II.

That at all times herein mentioned the defendant has been and now is a corporation organized under the laws of New Jersey, with its principal place of business and head office in New Brunswick, New Jersey, and has been and now is engaged in the general fire insurance business and has been and now is authorized to conduct its said business in the United States and plaintiff is informed and believes and upon such information and belief, alleges the truth to be that the defendant has complied with all the laws of the State of Idaho regarding foreign corporations and fire insurance companies doing business in the State of Idaho and has been and now is authorized to conduct and carry on its said business within the State of Idaho, and to make and enter into contracts of indemnity against loss by fire and issue and deliver fire insurance policies in conformity with and agreeable to the laws of the State of Idaho. [158]

III.

That at all times herein mentioned, Fred Veatch and M. J. Veatch have been and now are copartners

doing business at Moscow, Latah County, Idaho, under the name and style of Veatch Realty Co., and that said copartnership has been and now is engaged in the business of writing fire insurance.

IV.

That during all the times herein mentioned, the said Veatch Realty Co. has been and now is the duly appointed and authorized agent of the defendant at Moscow, Latah County, Idaho, and is authorized as such agent to make, issue and deliver to patrons of defendant its policies of insurance, indemnifying against loss by fire.

V.

That the buildings and premises in which plaintiff has been and now is conducting and carrying on its said business are located at the southeast corner of the intersection of Main and C Streets in Moscow, Idaho, and that upon the twenty-eighth day of July, 1920, and while plaintiff was the owner of said building and the contents thereof, the defendant acting by its duly authorized agent, Veatch Realty Co., did, upon the consideration of the stipulations therein named, and of \$150.00 premium thereon, make, execute and deliver to the plaintiff its policy of insurance, No. 911476, whereby it, the defendant, did insure plaintiff, for the term of one year from the twenty-eighth day of July, 1920, at noon, to the twenty-eighth day of July, 1921, at noon, against any direct loss of merchandise of every description, consisting principally of cider vinegar, or any damage thereto, by fire, in an amount not exceeding \$6,000.00 while contained in

said building, and which said building is described in said policy of insurance as located at No. 244 on the southeast corner of Main and "C" Streets, in Moscow, Idaho, and as being located in Block 102, No. 244—"D," according to Sanborn's Fire Insurance map of Moscow, Idaho, and that said building was described in said policy of insurance as a three-story, composition [159] roof, brick and one-story frame building and its additions of like construction communicating and in contact therewith. That a true and correct copy of said policy of insurance is hereunto attached and made a part hereof and plaintiff asks that in all proceedings herein, said policy of insurance may be read and all its terms and conditions be considered with the same force and effect as if the legal effect thereof were pleaded herein by affirmative allegations.

VI.

That said policy of insurance so executed and delivered to the plaintiff permitted other concurrent insurance upon said building, and said defendant did thereby promise and agree that in the event of the direct loss of or damage to said merchandise while contained in said building by fire, it would pay plaintiff its share or portion thereof.

VII.

That long prior to July 6th, 1921, plaintiff paid to defendant and defendant has accepted and received from plaintiff the said consideration for said policy of insurance, to wit, the sum of \$150.00 the premium thereon.

VIII.

That after the issuance and delivery of said policy of insurance to plaintiff, as above set forth, and on or about the 6th day of July, 1921, and while plaintiff was the owner thereof, said building was partially destroyed, and the merchandise contained therein, consisting principally of cider vinegar, was wholly destroyed by fire, for the origin of which plaintiff was in no way or manner responsible, and that when so destroyed by fire there was other concurrent insurance upon said merchandise under certain policies of insurance issued by other companies in the amount of \$25,000.00 and that plaintiff's loss upon said fire, amounted to \$31,116.00, and that the amount thereof for which the defendant became and now is liable to and is now owing plaintiff under its said Policy of Insurance No. 911476, is \$6,000.00. [160]

IX.

That upon the occurrence of said fire the plaintiff gave the defendant immediate notice of the loss thereby in writing and within sixty days after the fire, rendered a statement to the defendant, signed and sworn to by plaintiff, stating the knowledge and belief of plaintiff as to the time and origin of said fire, the interest of plaintiff in the property and the amount of loss thereon, all other insurance covering said merchandise or any part thereof, and a copy of all the descriptions and schedules in all policies thereon, by whom and for what purpose the said building and the several parts thereof were occupied at the time of said fire and complied

with all the terms and conditions in said policy of insurance contained by it to be kept and performed in case of a loss thereof or injury thereto by fire.

X.

That it is provided in said policy of insurance that the sum for which defendant is liable pursuant to said policy, shall be payable sixty days after due notice and proof of loss, that this plaintiff gave said notice required by the terms of said policy and made said proof of loss and delivered the same to the defendant on the 29th day of August, 1921, and more than sixty days have elapsed since making said proof of loss as required by the terms of said policy, and that the defendant has not paid its said loss to the plaintiff, or any part or portion thereof.

XI.

That by reason of the premises plaintiff alleges that the defendant is indebted to the plaintiff in the sum of \$6000, with interest thereon from October 29th, 1921, at the rate of 7% per annum, no part of which has been paid.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of \$6000.00 with interest thereon from and after the 29th day of October, 1921, until the entry of judgment herein, at the rate of seven per cent per annum, and for its costs and disbursements [161] herein sustained.

FRANK L. MOORE,

Attorney for Plaintiff, Residing at Moscow, Idaho.

(Duly verified.) [162]

Exhibit "A."

**STANDARD FIRE INSURANCE POLICY
STOCK COMPANY.**

No. 911476.

**THE NEW BRUNSWICK FIRE INSURANCE
COMPANY**

New Brunswick, N. J.

PACIFIC DEPARTMENT

San Francisco.

Wm. W. Alverson, Manager.

Organized 1826.

Amount \$6000.00 Rate 250 Premium \$150.00

IN CONSIDERATION of the stipulations herein named and of One Hundred Fifty and no/100 Dollars premium, does insure LEO BROTHERS COMPANY, for the term of One Year from the Twenty-eighth day of July, 1920, at noon to the twenty-eighth day of July, 1921, at noon, against ALL DIRECT LOSS OR DAMAGE BY FIRE, except as hereinafter provided, to an amount not exceeding SIX THOUSAND AND No. 100 Dollars, to the following described property while located and contained as described herein, and now elsewhere, to wit:

Standard Forms Bureau Form 367 (May 1918).

MERCHANDISE AND FIXTURES FORM.

On the following described property, all situate No. 244 on the Southeast corner of Main and "C" Streets, in Moscow, Idaho:

- * \$6000.00 On merchandise of every description, consisting principally of Cider Vinegar manufactured or in process of manufacture, and on materials from manufacturing same, including packages, labels, cases, boxes and all wrapping and packing materials, being the property of insured or sold but not removed; and (PROVIDED the insured shall be liable by law for loss or damage thereto or shall have specifically assumed liability therefor) this insurance shall also cover merchandise held in trust, or on commission, or left for storage or repairs; all only while contained in the three story comp. roof, brick & one story frame building and its additions (if any) of like construction communicating and in contact therewith, situate as above.
- * 2 \$Nil On store, office and workshop furniture and fixtures and equipment; and on awnings, implements, signs and tools; and on supplies incidental to the business of insured not described under item 1 above; all only while contained in, on or attached to above described building and its additions (if any) of like construction communicating and in contact therewith.

| | | | |
|-----|-------|----|-------|
| * 3 | \$Nil | On | ..... |
| | | | |
| * 4 | \$Nil | On | ..... |
| | | | |

* No insurance attaches under any of the above items unless a certain amount is specified and inserted in the blank immediately preceding the item.

Loss or damage for which insured shall be liable by law, or for which insured shall have specifically assumed liability, under item 1 above, shall be adjusted with and payable to the insured named in this policy.

“Restriction in Case of Specific Insurance.” No article or piece of personal property separately insured for a specific amount under [163] this, or any other policy, is covered by this policy except for such specified amount, if any, named herein; nor shall this company be liable for loss to merchandise of others for which the insured is liable by law or shall have specifically assumed liability, on which insurance is carried by or in the name of others than the insured named in this policy.

“SIDEWALK CLAUSE.” It is understood that property above described is also covered under its respective items, on sidewalks, platforms and alleyways pertaining to above described building, only while in daily transit to and from said building.

Other insurance permitted.

The provisions printed on the back of this form are hereby referred to and made a part hereof.

Attached to Policy No. 911476 of the New Brunswick Agency at Moscow, Idaho. Dated July 28, 1920.

Insurance Map.

Sheet 4.

Block 102.

No. 244.

VEATCH REALTY CO.,

Agent.

For other provisions see reverse side of this rider.
Provisions Referred to in and Made A Part of This
Rider (367):

“PERMITS.” Permission granted to make alteration or repairs to the above building without limit of time, and to build additions, and if of like construction and communicating and in contact therewith, this policy shall cover in same under its respective items; permission also granted to do such work in said building as the nature of the occupancy may require; to work at any and all times; and, when not in violation of law or ordinance, to generate illuminating gas or vapor, and to keep and use the necessary quantities of all articles, things and materials incidental to the business conducted therein and for the operation of said building, it being warranted by insured that no artificial light (other than incandescent electric light) be permitted in the room when the reservoir of any machine or device using petroleum or any of its products of greater inflammability than kerosene oil is being filled or drawn on. A breach of this warranty suspends this insurance during such

breach. But notwithstanding anything here contained, the use, keeping, allowing, or storing on the within described premises of dynamite, fireworks, Greek fire, gunpowder in excess of fifty pounds, nitro glycerine or other explosives is prohibited and shall wholly suspend this policy during the period such use, keeping, allowing or storing shall continue unless a specific permit therefor is attached to this policy.

“LIGHTNING CLAUSE.” This policy shall cover any direct loss or damage by lightning (meaning thereby the commonly accepted use of the term “lightning” and in no case to include loss or damage by cyclone, tornado or windstorm) and not exceeding the sum insured nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy; provided, however, that if there shall be any other insurance on said property this company shall be liable only *pro rata* with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

“ELECTRICAL EXEMPTION CLAUSE.” If dynamos, wiring, lamps, motors, switches or other electrical appliances or devices are insured by this policy, this insurance shall not cover any immediate loss or damage to dynamos, excitors, lamps, motors, switches, or any other apparatus for generating, utilizing, testing, regulating, or [164] distributing electricity, caused directly by electric currents therein whether artificial or natural.

This policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this policy, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

IN WITNESS WHEREOF, THIS COMPANY HAS EXECUTED and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized agent of the company at Moscow, Idaho.

GEO. A. VIEHMANN,
President.

CHAS. D. ROSS,
Secretary.

COUNTERSIGNED at Moscow, Idaho, this
28th day of July, 1920.

FRED VEATCH,
Agent. [165]

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged, with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false

swearing by the insured touching any matter relating to this insurance or the subject thereof whether before or after a loss.

This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple, or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this

policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States Standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days. [166]

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidence of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If any application, survey, plan, or description, of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this com-

pany at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except than when this policy is canceled by this company by giving notice it shall retain only the *pro rata* premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location

bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not. [167]

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed therein; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery

destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected

by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater portion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for reinsurance shall be as specifically agreed hereon. [168]

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such

right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to included the legal representative of the insured, and whenever the word "loss" occurs, it shall be deemed the equivalent of "loss" or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

ASSIGNMENT OF INTEREST BY INSURED:

This Policy is not assignable for purposes of collateral security, but in all such cases it is to be made "Payable in case of loss, etc., by declaration on its face. In case of actual sale or transfer of title, the annexed form should be used, which must be executed at the time of said transfer.

FOR VALUE RECEIVED, — hereby transfer, assign and set over unto — and — assigns — title and interest in this policy and all advantages to be derived therefrom subject to all the

terms and conditions therein mentioned and referred to.

_____,
(Signature of Insured.)

_____, 19—.

THE NEW BRUNSWICK FIRE INSURANCE
COMPANY

hereby consents that the interest of —— in the
within policy subject to all the terms and conditions
therein mentioned and referred to, to be assigned
to ——.

_____,
Agent.

_____, 19—.

FORM FOR REMOVAL.

Permission is hereby granted to remove the prop-
erty insured by this policy to the ——, situate ——,
and this Policy is hereby made to cover the same
property for like amounts in new locality, all liabil-
ity in former locality to cease from this date.

Rate increase to —— %. Additional Premium \$——.

Rate reduced to —— %. Return Premium \$——.

Dated _____, 19—.

Sheet ——. Block ——. No. ——.

_____,
Agent. [169]

[Endorsed on back:]

STANDARD FIRE INSURANCE POLICY.
STOCK COMPANY.

Expires July 28, 1921.

Location Vinegar.

Amt. \$6000.00. Premium \$150.00.

Name of Insured:

LEO BROTHERS COMPANY.

No. 911476.

THE NEW BRUNSWICK.

Organized 1826.

FIRE INSURANCE COMPANY,

New Brunswick, N. J.

Pacific Department,

266 Bush Street, San Francisco, Cal.

Rotunda Mills Building.

WM. W. ALVERSON, Manager.

H. T. Ungewitter, Assistant Manager.

It is important that the written portions of all policies covering the same property read exactly alike.

If they do not, they should be made uniform at once.

Please read your policy.

U. S. District Court, District of Idaho. Filed
Jan. 28, 1922. W. D. McReynolds, Clerk. [170]

In the District Court of the United States for the
District of Idaho, Central Division.

LEO BROTHERS, a Corporation,

Plaintiff,

vs.

THE NEW BRUNSWICK FIRE INSURANCE
COMPANY, a Corporation,

Defendant.

Stipulation Waiving Jury.

It is hereby agreed and stipulated by and between the parties hereto, through their attorneys of record, that the issues of fact in the above-entitled cause may be tried and determined by the Court without the intervention of a jury, the parties hereto hereby waiving a jury.

Dated this 19th day of May, 1922.

FRANK L. MOORE,

Attorneys for Plaintiff.

WM. E. LEE,

E. EUGENE DAVIS,

Attorneys for Defendant. [171]

(Title of Court and Cause.)

#785.

Judgment.

This cause came on regularly for trial on the 19th day of May, A. D. 1922, and the plaintiff appearing

by Frank L. Moore, its counsel of record, and the defendant appearing by its counsel of record, E. Eugene Davis, Esq., and Orland & Lee, and a trial by a jury having been expressly waived by the respective parties by written stipulation filed with the clerk of the above-entitled Court, the cause was tried before the Court sitting without a jury; whereupon witnesses on the part of plaintiff and defendant were duly sworn and examined and documentary evidence was introduced by the respective parties, and the evidence being closed, the cause was submitted to the Court for consideration and decision, and after due deliberation thereon, the Court files its findings and decision in writing, and orders that judgment be entered herein in accordance therewith in favor of the plaintiff.

WHEREFORE, by reason of the law and the findings aforesaid, it is ordered, adjudged and decreed that the plaintiff, Leo Brothers Company, a corporation, do have and recover of and from the defendant, The New Brunswick Fire Insurance Company, a corporation, the sum of Four Thousand and Fourteen Dollars (\$4014.00), and for plaintiff's costs and disbursements herein expended, taxed at \$20.25.

Dated this 19th day of September, 1922.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed Sept. 19, 1922. W. D. McReynolds, Clerk. [172]

In the District Court of the United States for the
District of Idaho, Central Division.

No. 785.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

THE NEW BRUNSWICK FIRE INSURANCE
COMPANY, a Corporation,
Defendant.

Exceptions of Defendant.

Comes now defendant and excepts to the decision of the Court in the entry of judgment herein, for the reason that there is no evidence to support said decision and judgment and said decision and judgment are against the law and facts in the case.

Defendant further excepts to the Court's failure and refusal to make findings and enter judgment for defendant herein.

E. EUGENE DAVIS,
Spokane, Washington,
WM. E. LEE,
Moscow, Idaho,
Attorneys for Defendant.

U. S. District Court, District of Idaho. Filed
Oct. 10, 1922. W. D. McReynolds, Clerk. [173]

In the District Court of the United States, Central Division, District of Idaho.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

THE NEW BRUNSWICK FIRE INSURANCE
COMPANY, a Corporation,
Defendant.

Petition for New Trial.

Comes now the defendant and petitions the Court to vacate judgment herein and grant defendant a new trial, upon the following grounds:

I.

Insufficiency of the evidence to justify a decision and judgment, and that said decision and judgment are against law.

II.

Error in law occurring at the trial.

This application is made upon the pleadings herein, consisting of plaintiff's complaint and defendant's answer and the judgment herein, and upon the minutes of the Court which shall include the clerk's minutes and any notes and memorandum which may have been kept by the Judge and also reporter's transcript of his shorthand notes of the evidence introduced.

Defendant specifies the following particulars wherein the evidence is insufficient to justify the decisions or sustain the judgment:

(a) The evidence is insufficient and there is no evidence to establish in any manner, or tend to establish, any liability on the part of the defendant, as insurer, for the loss of the property in question.

(b) The evidence is insufficient and there is no evidence to establish any contract of insurance with defendant covering the property destroyed by fire. [174]

(c) The evidence is insufficient and there is no evidence to sustain a decision that the property destroyed by fire was included within the description of the property insured by the contract in question.

(d) The evidence is insufficient and there is no evidence to establish, or tend to establish, the fact that the property destroyed by fire was located, situated or contained in the building described in said contract of insurance as located at #244 on the southeast corner of Main and C Street, Moscow, Idaho.

(e) The evidence is insufficient and there is no evidence to establish, or tend to establish, the fact that the property destroyed by fire was located, situated or contained in the building described in said contract of insurance as located in Block 102, #244 Sanborn's fire map of Moscow, Idaho.

(f) The evidence is insufficient and there is no evidence to establish, or tend to establish, the fact that the property destroyed by fire was the property agreed to be insured by the contract of the parties.

(g) The evidence is insufficient and there is no evidence to establish, or tend to establish, the fact that the property destroyed by fire was located and situated in any building agreed upon between the parties as the building wherein the insured property was to be located.

(h) The evidence is insufficient and there is no evidence to establish, or tend to establish, the fact that on account of the destruction of any property belonging to plaintiff this defendant became, or is liable to, or is owing plaintiff the sum of \$4014.00, or any other sum.

(i) The evidence is insufficient and there is no evidence establishing, or tending to establish, that defendant agreed to insure any property located or contained in the building used as storage for vinegar tanks and their contents.

(j) The evidence is insufficient and there is no evidence or disputed questions of fact upon which the finding or [175] decision can be based to establish, or tend to establish, that defendant ever entered into any contract of insurance with plaintiff to insure it against the loss of the property destroyed.

(k) The evidence is insufficient to justify the decision and judgment in that the evidence shows without dispute that the parties to the contract of insurance agreed that the building referred to as the factory proper and the building referred to as the vinegar factory proper and the building referred to as the vinegar tank-sheds were two

separate and distinct risks and two separate and distinct subjects of insurance.

(1) The decision and judgment is against law in that there is no fact or inference therefrom to support the finding that the property destroyed by fire was included within any contract of insurance entered into between plaintiff and defendant.

Defendant specifies the following particular errors of law relied upon:

The Court erred in construing the agreement of the parties as a contract for the insurance of the contents of the building referred to as the vinegar tank-shed.

The Court erred in denying defendant's motion for judgment at the close of plaintiff's case.

The Court erred in refusing to make findings in favor of defendant as requested at the close of the entire case.

The Court erred in deciding the issues in favor of plaintiff.

The Court erred in entering judgment in favor of plaintiff.

E. EUGENE DAVIS,
WM. E. LEE,
Attorneys for Defendant.

U. S. District Court, District of Idaho. Filed
Oct. 16, 1922. W. D. McReynolds, Clerk. [176]

(Title of Court and Cause.)

Order Denying New Trial.

Defendant's petition for a new trial having been submitted by written stipulation,—

Upon consideration it is ORDERED that said petition be, and the same hereby is, denied.

Dated this 19th day of June, 1923.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed June 19, 1923. W. D. McReynolds, Clerk. By Pearl E. Zanger, Deputy.
[177]

In the District Court of the United States, Central Division, District of Idaho.

No. 785.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

THE NEW BRUNSWICK FIRE INSURANCE
COMPANY, a Corporation,
Defendant.

Petition for Writ of Error.

The defendant, the New Brunswick Fire Insurance Company, a corporation, feeling itself aggrieved by the decision and judgment entered thereon in the above-entitled cause, comes now, by its attorneys, and petitions this Honorable

Court, and the Honorable Frank S. Dietrich, Judge thereof, for an order allowing it to prosecute a writ of error to the Honorable United States Circuit Court of Appeals, for the Ninth Circuit, under and in accordance to the laws of the United States in that behalf made and approved and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that the judgment heretofore rendered be superseded and stayed pending the determination of said cause in the Honorable Circuit Court of Appeals.

C. J. ORLAND,

Moscow, Idaho,

E. EUGENE DAVIS,

Spokane, Wn.,

Attorneys for Defendant.

U. S. District Court, District of Idaho. Filed Aug. 17, 1923. W. D. McReynolds, Clerk. [178]

In the District Court of the United States, Central Division, District of Idaho.

No. 785.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

THE NEW BRUNSWICK FIRE INSURANCE
COMPANY, a Corporation,
Defendant.

Assignments of Error.

Comes now the above-named defendant by its attorneys, and files the following assignments of error upon which it will rely upon its prosecution of writ of error in the above-entitled cause from that certain judgment made by this Honorable Court on the 19th day of September, 1922:

I.

That the United States District Court for the District of Idaho erred in deciding that the property destroyed by fire was insured under the policy of insurance sued on in the plaintiff's complaint.

II.

That the United States District Court for the District of Idaho erred in denying defendant's motion for judgment at the close of plaintiff's case.

III.

That the United States District Court for the District of Idaho erred in denying defendant's motion for judgment at the close of the entire case.

IV.

That the United States District Court for the District of Idaho erred in refusing to make findings for defendant as requested at the close of the entire case. [179]

V.

That the United States District Court for the

District of Idaho erred in entering judgment for plaintiff in any sum.

VI.

That the United States District Court for the District of Idaho erred in deciding that there was any evidence or inference therefrom that the property destroyed was located or contained in the building described in the policy sued on as Block 102, No. 244, Sanborn Map, on the S. E. corner of Main and "C" Streets, Moscow.

VII.

That the United States District Court for the District of Idaho erred in construing the agreement of the parties as a contract of insurance of the contents of the building known as "Vinegar Tank Shed" referred to as Risk 240.

VIII.

That the United States District Court for the District of Idaho erred in deciding that the building, the contents of which were destroyed, was the same building or part thereof, as the building known and described as No. 244, Block 102, Sanborn Map.

IX.

That the United States District Court for the District of Idaho erred in not deciding that the two buildings were separate and distinct insurance risks, and that the building and contents destroyed

were not insured under the contract of insurance sued on in plaintiff's complaint.

C. J. ORLAND,

Moscow, Idaho.

E. EUGENE DAVIS,

Spokane, Wn.,

Attorneys for Defendant (Plaintiff in Error).

U. S. District Court, District of Idaho. Filed Aug. 17, 1923. W. D. McReynolds, Clerk. [180]

In the District Court of the United States, Central Division, District of Idaho.

No. 785.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

THE NEW BRUNSWICK FIRE INSURANCE
COMPANY, a Corporation,
Defendant.

Order Allowing Writ of Error.

Upon motion of E. Eugene Davis and C. J. Orland for the above-named defendant, and upon filing a petition for a writ of error and assignment of errors as required by law, it is hereby

ORDERED, that a writ of error be and the same is hereby allowed to have reviewed in the Honorable United States Circuit Court of Appeals for the Ninth Circuit the judgment entered herein; and it is further ordered that the amount of bond on said

writ of error is hereby fixed at the sum of five hundred (\$500.00) dollars, to be given by the defendant, and on the giving of said bond the judgment heretofore rendered will be superseded pending the hearing of said cause in the Honorable Circuit Court of Appeals.

IN WITNESS WHEREOF, the above order is granted and allowed this 18th day of August, 1923.

FRANK S. DIETRICH,
Judge.

U. S. District Court, District of Idaho. Filed Aug. 18, 1923. W. D. McReynolds, Clerk. [181]

In the District Court of the United States, Central Division, District of Idaho.

No. 785.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

THE NEW BRUNSWICK FIRE INSURANCE
COMPANY, a Corporation,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, the New Brunswick Fire Insurance Company, a corporation, as principal, and United States Fidelity & Guaranty Company, a corporation organized under the laws of the State of Maryland and authorized to transact business as surety in

the State of Idaho, are held and firmly bound unto Leo Brothers Company, plaintiff in the above action, in the sum of five hundred (\$500.00) dollars for which sum well and truly to be paid to said Leo Brothers Company, its successors or assigns, we bind ourselves, our and each of our successors and assigns jointly and severally, firmly by these presents.

Sealed with our seals and dated this 5th day of September, A. D. 1923.

The condition of this obligation is such that whereas, the above-named defendant, New Brunswick Fire Insurance Company, a corporation, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause made and entered by the District Court of the United States for the District of Idaho, Central Division, and

WHEREAS, the said New Brunswick Fire Insurance Company, a corporation, desires to supersede said judgment and stay the issuance of execution thereon pending the determination of said cause in the said United States Circuit Court of Appeals for the Ninth Circuit; [182]

NOW, THEREFORE, the condition of this obligation is such that if the above-named New Brunswick Fire Insurance Company, a corporation, shall prosecute said writ of error to effect and pay all necessary costs and damages awarded against it, including the full amount of said judgment and interest, if it shall fail to make good its plea, then

this obligation shall be void, else to remain in full force and virtue.

NEW BRUNSWICK FIRE INSURANCE
COMPANY.

By E. EUGENE DAVIS,
Its Attorney.

Approved this 5th day of September, A. D. 1923.

FRANK S. DIETRICH,
Judge.

UNITED STATES FIDELITY & GUAR-
ANTY CO.

By HENRY WHITSON,
Attorney-in-Fact.

U. S. District Court, District of Idaho. Filed
Sep. 5, 1923. W. D. McReynolds, Clerk. [183]

In the District Court of the United States, Central
Division, District of Idaho.

No. 785.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

THE NEW BRUNSWICK FIRE INSURANCE
COMPANY, a Corporation,
Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States to the Honorable Judge of the District Court of the United States for the District of Idaho, Northern Division, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, or some of you, between the New Brunswick Fire Insurance Company, plaintiff in error and Leo Brothers Company, defendant in error, a manifest error hath happened to the great damage of the said New Brunswick Fire Insurance Company, a corporation, the plaintiff as by its petition herein appears:

That being willing that error, if any, hath happened, should be duly corrected and full and speedy justice be done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then under you seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco in the State of California within thirty days from the date thereof, in the said Circuit Court of Appeals, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause to be done further therein to correct that error, what of right

and according to law and customs of the United States should be done. [184]

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, and the seal of this court this 5th day of Sept., in the year of our Lord one thousand nine hundred and twenty-three.

W. D. McREYNOLDS,
Clerk of the District Court of the United States
for the District of Idaho, Northern Division.
Allowed by

FRANK S. DIETRICH,
District Judge.

U. S. District Court, District of Idaho. Filed
Sep. 5, 1923. W. D. McReynolds, Clerk. [185]

In the District Court of the United States, Central Division, District of Idaho.

No. 785.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

THE NEW BRUNSWICK FIRE INSURANCE
COMPANY, a Corporation,
Defendant.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States of America to
Leo Brothers Company, Defendant in Error,
GREETINGS:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the courtroom of said court in the city of San Francisco and State of California, within thirty days from the date of this citation, pursuant to a writ of error on file in the clerk's office of the District Court of the United States in and for the District of Idaho, Central Division, wherein the New Brunswick Fire Insurance Company, a corporation, is plaintiff in error, and Leo Brothers Company is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM H. TAFT, Chief Justice of the United States, this 5th day of September, 1923.

FRANK S. DIETRICH,

United States District Judge.

[Seal]

Attest: W. D. McREYNOLDS,

Clerk.

Service of the foregoing citation admitted and a true copy thereof received this 13th day of Sep-

tember, 1923, all other service and return hereby waived.

FRANK L. MOORE,
Attorney for Plaintiff.

U. S. District Court, District of Idaho. Filed
Sep. 22, 1923. W. D. McReynolds, Clerk. By
M. Franklin, Deputy. [186]

In the District Court of the United States, Central
Division, District of Idaho.

No. 784.

CONSOLIDATED CASES.

No. 785.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

NORWICH UNION FIRE INSURANCE SO-
CIETY, LTD., OF NORWICH AND LON-
DON, ENGLAND, a Corporation,
Defendant.

and

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

THE NEW BRUNSWICK FIRE INSURANCE
COMPANY, a Corporation,
Defendant.

Order Waiving Supersedeas Bond.

On stipulation of parties hereto, it is ordered that supersedeas bond in the above-entitled consolidated actions be waived, and that no execution upon the judgments in said actions be taken until remittiturs from the Circuit Court of Appeals be filed herein.

Done this 5th day of September, 1923.

FRANK S. DIETRICH,

District Judge.

U. S. District Court, District of Idaho. Filed Sep. 5, 1923. W. D. McReynolds, Clerk. [187]

In the District Court of the United States, District of Idaho, Central Division.

Nos. 784 and 785.

CONSOLIDATED CASES HERETO.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

NORWICH UNION FIRE INSURANCE SOCIETY, LIMITED, OF NORWICH AND LONDON, ENGLAND, a Corporation,
Defendant.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

THE NEW BRUNSWICK FIRE INSURANCE
COMPANY, a Corporation,
Defendant.

Praecipe for Transcript to Circuit Court of Appeals.

To the Clerk of the Above-entitled Court.

You will please prepare and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, a true copy of the record in the above-entitled consolidated causes, which shall contain a record of all the proceedings herein, opinion, or opinions of the Court, bill of exceptions, assignments of error and all proceedings in said consolidated cases, together with the original writs of error and citations and a certificate under your seal, stating in detail the cost of the record and by whom paid.

C. J. ORLAND,

Moscow, Idaho,

E. EUGENE DAVIS,

Spokane, Washington,

Attorneys for Defendants.

U. S. District Court, District of Idaho. Filed
Sep. 22, 1923. W. D. McReynolds, Clerk. [188]

In the District Court of the United States for the
District of Idaho, Central Division.

Nos. 784 and 785.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

NORWICH UNION FIRE INSURANCE SO-
CIETY, LIMITED, OF NORWICH AND
LONDON, ENGLAND, a Corporation,
Defendant.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

NEW BRUNSWICK FIRE INSURANCE COM-
PANY, a Corporation,
Defendant.

Order to Transmit Exhibits.

It is hereby ordered that the original exhibits
used in the trial of the above-entitled consoli-
dated causes in the United States District Court
be, by the clerk of said Court, transmitted with
the transcript on appeal to the United States Cir-
cuit Court of Appeals at San Francisco, California.

Done in open court this 22d day of September,
1923.

FRANK S. DIETRICH,
Judge.

U. S. District Court, District of Idaho. Filed
Sep. 22, 1923. W. D. McReynolds, Clerk. [189]

In the District Court of the United States for the
District of Idaho, Central District.

Nos. 784 and 785.

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

THE NEW BRUNSWICK FIRE INSURANCE
COMPANY, a Corporation,
Defendant,

and

LEO BROTHERS COMPANY, a Corporation,
vs.

NORWICH UNION FIRE INSURANCE COM-
PANY,
Defendant.

Stipulation Re Printing of Record.

It is hereby stipulated between the parties hereto, through their respective attorneys of record, that in printing the record of the above-entitled cases the following parts and portions thereof be omitted:

In the Case of Leo Brothers Company versus the New Brunswick Fire Insurance Company the Summons, Notice, Petition for Removal, Bond and Order of Removal Demurrer, and Answer in said case, it being stipulated that the Answer in said case consists of specific denials of all of the Com-

plaint except Paragraphs #1 and #2, which are admitted.

In the case of Leo Brothers Company versus the Norwich Union Fire Insurance Company the Summons, Notice, Petition for Removal, Bond and Order of Removal, Demurrer, and Answer in said case, it being stipulated [190] that the Answer consists of specific denials of all of the Complaint except Paragraphs #1 and #2 which are admitted.

Plaintiff's Exhibits #1 and #2 may be omitted it being stipulated that the exhibits attached to the Complaint are true copies thereof.

Defendant's Exhibits #12 and #13 and Plaintiff's Exhibits #14, #15, #16, #17 and #20, and also the testimony of witnesses Tillman D. Gerlough, R. E. Nidag, G. A. Riley, W. C. Webster may be omitted, the said exhibits and testimony relating only to the amount of recovery, it being stipulated that the plaintiff in error is urging no error thereon.

Defendant's Exhibits #4, #5, #6 and #11 and Plaintiff's Ex. #2 may be omitted.

Defendant's Exhibit 8-C, being the daily report of the Home Insurance Company's Policy #4972, may be omitted as being identical with Defendant's Exhibit #8 except as to the number of the Policy.

Defendant's Exhibit #18, being the book of Tariff Rates and Rules and Defendant's Exhibit #19, being the book of Specific Rates of Moscow,

may be omitted, it being stipulated that said books be referred to and be made a part of the record.

FRANK L. MOORE,
Attorney for Plaintiffs.

C. J. ORLAND,
E. EUGENE DAVIS,
Attorneys for Defendants.

U. S. District Court, District of Idaho. Filed
Nov. 8, 1923. W. D. McReynolds, Clerk. [191]

EAST 29

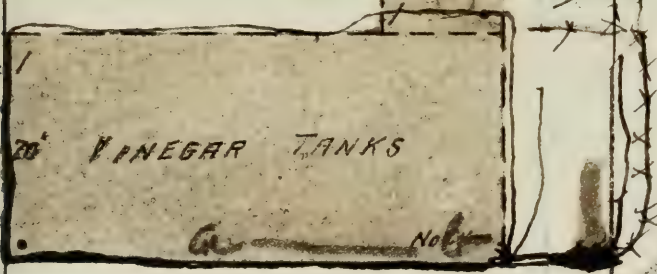
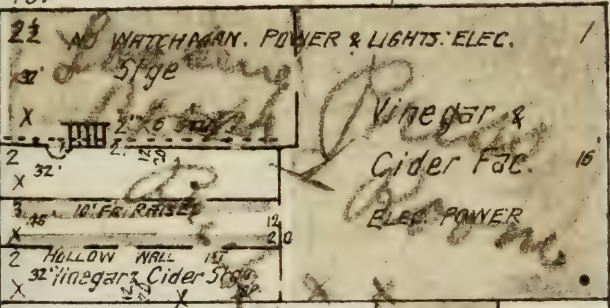
C.

8" W. PIPE

C. EAST.

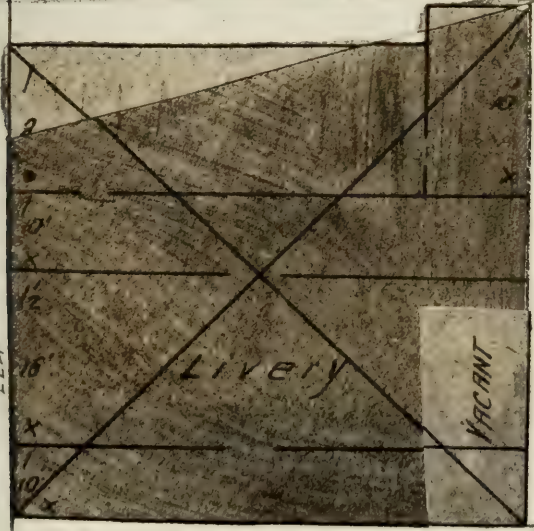
LEO BROS. CO. VINEGAR & CIDER FAC.

101



(BL. 102)

CORRAL

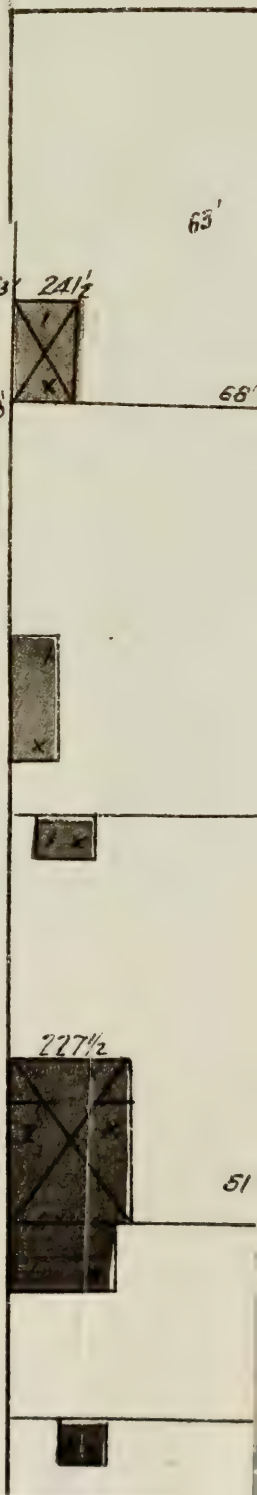


(BL. 102)

102

38'

ALLEY



Defendant's Exhibit No. 7.

MAIN STREET—EAST SIDE

| No. of Rating | Location | Class | Occupation | Bldg. | Cents. | Moscow, Idaho P-3 Rating Takes Effect |
|------------------|----------------------------|-------|-------------------|-------|--------|---|
| 1 | C and A. Streets—Block 102 | | | | | |
| 2 | SE c C (244) | C-D | Vinegar Factory | 250 | | |
| 3 | South | D | Vinegar Tanks | 245 | | Oct. 15-19 |
| 4 | South (224) | D | *Warehouse | 340 | | April 1-20 |
| 5 | South (210) | C | Office | 100 | | |
| 6 | NE c A (200) | C | Dwelling | 45 | | |
| 7 | A and First—Block 101 | | | | | |
| 8 | SE c A (124-122) | I-C | B-Vidaho Hotel | 285 | | |
| 9 | South (114) | C | Two-story Brick | 90 | | April 9-18 |
| 10 | NE c First (102-108) | C | Two-story Brick | 94 | | April 9-18 |
| 11 | | | Offices | 94 | | April 9-18 |
| 12 | First and Second—Block 1 | | | | | |
| 13 | SE c 1st (102-108½) | C | Three-story Brick | 127 | | April 7-21 |
| 14 | South (112) | C | Two-story Brick | 156 | | Nov. 10-19 |
| 15 | | | Offices | | | Nov. 10-19 |
| 16 | NE c 2d (114-116) | C | Two-story Brick | 122 | | |

Moscow, Idaho P-3
Rating Takes
Effect

MAIN STREET—EAST SIDE

| No. of Rating | Location | Class | Occupation | Bldg. | Cents. |
|------------------|--------------------------|------------------------------|------------|-------|------------|
| 17 | ..... | Rooms | ..... | 127 | |
| 18 | ..... | Bank & Offices | ..... | 122 | |
| 19 | East on 2d (110)..... | C One-story Brick | ..... | 107 | |
| 20 | East on 2d (112)..... | C One-story Brick | ..... | 121 | |
| 21 | Second and Third—Block 2 | | | | |
| 22 | SE c 2d (202-206)..... | C One-story Brick | ..... | 138 | June 26-19 |
| 23 | ..... | Ladies Furnishings | ..... | 170 | June 26-19 |
| 24 | ..... | Bank & Offices | ..... | 138 | June 26-19 |
| 25 | ..... | Stationery & Book Store | ..... | 170 | June 26-19 |
| 26 | South (208-214)..... | C One-story Brick | ..... | 143 | June 26-19 |
| 27 | ..... | Candy Store | ..... | 173 | June 26-19 |
| 28 | ..... | Millinery Store | ..... | 228 | June 26-19 |
| 29 | Adj. Rear (212½)..... | C One-story Brick | ..... | 158 | |
| 30 | Adj. Rear | C-B-VStge. & Ice Cream Plant | ..... | 180 | |
| 31 | NE c 3d (206-112)..... | C Two-story Brick | ..... | 137 | |
| 32 | ..... | Offices | ..... | 122 | |
| 33 | ..... | Gents. Furn. Store | ..... | 147 | |
| 34 | ..... | Variety Store | ..... | 147 | |

*Rate includes charge for autos. [193]

MAIN STREET—EAST SIDE

| No. of Rating | Location | Class | Occupation | Bldg. | Cents. | Moscow, Idaho P-3 Rating Takes Effect |
|------------------|----------------------------|-------|-------------------|-------|--------|---|
| 1 | C and A. Streets—Block 102 | | | | | |
| 2 | SE c C (244) | C-D | Vinegar Factory | 250 | 250 | |
| 3 | South | D | Vinegar Tanks | 245 | 245 | Oct. 15-19 |
| 4 | South (224) | D | *Warehouse | 340 | 340 | April 1-20 |
| 5 | South (210) | C | Office | 100 | 100 | |
| 6 | NE c A (200) | C | Dwelling | 45 | 45 | |
| 7 | A and First—Block 101 | | | | | |
| 8 | SE c A (124-122) | I-C | B-Vidaho Hotel | 285 | 285 | |
| 9 | South (114) | C | Two-story Brick | 90 | 102 | April 9-18 |
| 10 | NE c First (102-108) | C | Two-story Brick | 94 | 135 | April 9-18 |
| 11 | | | Offices | | 94 | April 9-18 |
| 12 | First and Second—Block 1 | | | | | |
| 13 | SE c 1st (102-108½) | C | Three-story Brick | 127 | 152 | April 7-21 |
| 14 | South (112) | C | Two-story Brick | 156 | 185 | Nov. 10-19 |
| 15 | | | Offices | | 156 | Nov. 10-19 |
| 16 | NE c 2d (114-116) | C | Two-story Brick | 122 | 137 | |
| 17 | | | Rooms | | 127 | |


MAIN STREET—EAST SIDE

Moscow, Idaho P-3

| No. of Rating | Location | Class | Occupation | Bldg. Cents. | Rating Takes Effect |
|------------------|--------------------------|------------------------------|------------|--------------|------------------------|
| 18 | ..... | Bank & Offices | ..... | 122 | |
| 19 | East on 2d (110)..... | C One-story Brick | ..... | 107 | |
| 20 | East on 2d (112)..... | C One-story Brick | ..... | 121 | |
| 21 | Second and Third—Block 2 | | | | |
| 22 | SE c 2d (202-206)..... | C One-story Brick | ..... | 138 | June 26-19 |
| 23 | ..... | Ladies Furnishings | ..... | 170 | June 26-19 |
| 24 | ..... | Bank & Offices | ..... | 138 | June 26-19 |
| 25 | ..... | Stationery & Book Store | ..... | 170 | June 26-19 |
| 26 | South (208-214)..... | C One-story Brick | ..... | 143 | June 26-19 |
| 27 | ..... | Candy Store | ..... | 173 | June 26-19 |
| 28 | ..... | Millinery Store | ..... | 82½ | June 26-19 |
| 29 | Adj. Rear (212½)..... | C One-story Brick | ..... | 158 | |
| 30 | Adj. Rear | C-B-VStge. & Ice Cream Plant | ..... | 180 | |
| 31 | NE c 3d (206-112)..... | C Two-story Brick | ..... | 137 | |
| 32 | ..... | Offices | ..... | 122 | |
| 33 | ..... | Gents. Furn. Store | ..... | 147 | |
| 34 | ..... | Variety Store | ..... | 147 | |

*Rate includes charge for autos. [194]

Defendant's Exhibit No. 8.

 Mail this the day the policy is written.

Moscow, Idaho 3776-71

No. 4965 DAILY REPORT Commission

No. of Previous Policy.... %

THE HOME INSURANCE COMPANY, NEW
YORK.

Map: Sheet No. 4

Block No. 102

Street No. 240

Other Insurance in This

Company on or in Premises—.....

Class No..... Bp. Bu. Fp. Fu. Su. Sp.

Insurance in other Companies

.....

Amount, \$5,000.00 Rate 245 Premium, \$122.50

Special Rating ^{Page}Line No. — C. R. —
_{Card}

F. R. —

Premium: One Hundred Twenty-two and 50/100
Dollars.

Assured: LEO BROTHERS COMPANY.

Term: One year, from the Twenty-second day of
September, 1920, at noon, to the Twenty-second
day of September, 1921, at noon.

Against loss or damage by FIRE.

Amount—Five Thousand and No/100 Dollars.

EXACT COPY OF FORM ON POLICY:

Standard Forms Bureau Form 367

MERCHANDISE AND FIXTURES FORM

On the following described property, all situate at No. 240 on the East side of Main Street, between "A" and "C" Streets, in Moscow, Idaho.

*1. \$5000.00 On merchandise of every description, consisting principally of Vinegar & Vinegar Stock manufactured or in process of manufacture, and on materials for manufacturing same, including packages, labels, cases, boxes and all wrapping and packing materials, being the property of insured or sold but not removed; and (provided the insured shall be liable by law for loss or damage thereto or shall have specifically assumed liability therefor), this insurance shall also cover merchandise held in trust, or on commission, or left for storage or repairs; all only while contained in the one story shingle roof, frame building and its additions (if any) of like construction and communicating and in contact therewith, situate as above.

*2. \$ Nil On store, office and workshop furniture and fixtures and equipment; and on awnings, implements, signs and tools; and on supplies incidental to the business of insured not

described under Item 1 above; all only while contained in, on or attached to above described building and its additions (if any) of like construction communicating and in contact therewith.

*3. \$ Nil On

.....

*4. \$ Nil On

.....

*No insurance attaches under any of the above items unless a certain amount is specified and inserted in the blank immediately preceding the item.

Loss or damage for which insured shall be liable by law, or for which insured shall have specifically assumed liability, under item 1 above, shall be adjusted with and payable to the insured named in this policy.

“Restriction in Case of Specific Insurance.” No article or piece of personal property separately insured for a specific amount under this, or any other policy, is covered by this policy except for such specific amount, if any, named herein; nor shall this company be liable for loss to merchandise of others for which the insured is liable by law or shall have specifically assumed liability, on which insurance is carried by or in the name of others than the insured named in this policy.

“Sidewalk Clause.” It is understood that property above described is also covered under its respective items, on sidewalks, platforms and alley-

ways pertaining to above described building, only while in daily transit to and from said building.

Other insurance permitted.

The provisions printed on the back of this form are hereby referred to and made a part hereof.

Attached to Policy No. 4965 of the Home Insurance Co. Name of Company

Agency at Moscow, Idaho. Dated Sept. 21, 1920.

| | |
|------------|----------------|
| Trade mark | INSURANCE MAP. |
| STANDARD | Sheet 4 |
| 367 | Block 102 |
| May 1918 | No. 240 |

VEATCH REALTY CO.,

Agent.

For other provisions see reverse side of this rider.

Provisions referred to in and made part of this rider (No. 367).

“Permits.” Permission granted to make alteration or repairs to the above described building without limit of time, and to build additions, and if of like construction and communicating and in contact therewith, this policy shall cover in same under its respective items; permission also granted to do such work in said building as the nature of the occupancy may require; to work at any and all times; and, when not in violation of law or ordinance, to generate illuminating gas or vapor, and to keep and use the necessary quantities of all articles, things and materials incidental to the business conducted therein and for the operation of said building, it being warranted by insured that no artificial light

(other than incandescent electric light) be permitted in the room when the reservoir of any machine or device using petroleum or any of its products of greater inflammability than kerosene oil is being filled or drawn on. A breach of this warranty suspends this insurance during such breach. But notwithstanding anything herein contained, the use, keeping, allowing or storing on the within described premises of dynamite, fireworks, Greek fire, gunpowder in excess of fifty pounds, nitroglycerine or other explosives is prohibited and shall wholly suspend this policy during the period such use, keeping, allowing or storing shall continue unless a specific permit therefor is attached to this policy.

“Lightning Clause.” This policy shall cover any direct loss or damage by lightning (meaning thereby the commonly accepted use of the term “lightning” and in no case to include loss or damage by cyclone, tornado or windstorm) not exceeding the sum insured nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy; Provided, however, that if there shall be any other insurance on said property this company shall be liable only *pro rata* with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

“Electrical Exemption Clause.” If dynamos, wiring, lamps, motors, switches or other electrical appliances or devices are insured by this policy, this insurance shall not cover any immediate loss or damage to dynamos, excitors, lamps, motors, switches, or

any other apparatus for generating, utilizing, testing, regulating, or distributing electricity, caused directly by electric currents therein whether artificial or natural.

This report mailed Sept. 21, 1920.

VEATCH REALTY CO.,

Agent. [195]

Defendant's Exhibit No. 8A.

LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, LTD.

Agency at Moscow, Idaho.

Amount Insured, \$10,000.00

Rate, 245%.

Premium, \$245.00.

New Policy No. 113060.

Date of Exp., Nov. 19, 1921.

Renewal of No. 971191.

INSTRUCTIONS.—Report every Policy on the day it is issued. Give a full verbatim copy of the issue. Fill every blank in this sheet and have all the questions answered. Be particular in ascertaining the total amount of insurance on the property, and see that all policies are concurrent. Do not use this blank for reporting endorsements.

INSURANCE HAS BEEN GRANTED

To LEO BROTHERS COMPANY, of Moscow, Idaho, in the sum of TEN THOUSAND and No/100 DOLLARS.

Standard Forms Bureau Form 367.

MERCHANDISE AND FIXTURES FORM.

On the following described property, all situate

No. 240 on the East side of Main Street between "A" and "C" Streets, in Moscow, Idaho.

- *1. \$10,000.00 On merchandise of every description, consisting principally of Cider Vinegar & Cider Vinegar Stock manufactured or in process of manufacture, and on materials for manufacturing same, including packages, labels, cases, boxes and all wrapping and packing materials, being the property of insured or sold but not removed; and (Provided the insured shall be liable by law for loss or damage thereto or shall have specifically assumed liability therefor), this insurance shall also cover merchandise held in trust, or on commission, or left for storage or repairs; all only while contained in the One story comp. roof, frame building and its additions (if any) of like construction communicating and in contact therewith, situate as above.
- *2. \$ Nil On store, office and workshop furniture and fixtures and equipment; and on awnings, implements, signs and tools; and on supplies inci-

dental to the business of insured not described under Item 1 above; all only while contained in, on or attached to above described building and its additions (if any) of like construction communicating and in contact therewith.

- *3. \$ Nil On

 *4. \$ Nil On

*No insurance attaches under any of the above items unless a certain amount is specified and inserted in the blank immediately preceding the item.

Loss or damage for which insured shall be liable by law, or for which insured shall have specifically assumed liability, under item 1 above, shall be adjusted with and payable to the insured named in this policy.

“Restriction in Case of Specific Insurance.” No article or piece of personal property separately insured for a specific amount under this, or any other policy, is covered by this policy except for such specific amount, if any, named herein; nor shall this company be liable for loss to merchandise of others for which the insured is liable by law or shall have specifically assumed liability, on which insurance is carried by or in the name of others than the insured named in this policy.

“Sidewalk Clause.” It is understood that property above described is also covered under its re-

spective items, on sidewalks, platforms and alleyways pertaining to above described building, only while in daily transit to and from said building.

Other insurance permitted.

The provisions printed on the back of this form are hereby referred to and made a part hereof.

Attached to Policy No. 113060 of the Liverpool &
London & Globe Ins. Name of Company

Agency at Moscow, Idaho, Dated Nov. 13, 1920.

| | |
|------------|---------------|
| Trade Mark | INSURANCE MAP |
| STANDARD | Sheet 4 |
| 367 | Block 102 |
| May 1918 | No. 240 |

VEATCH REALTY CO.,
Agent.

For Other provisions see Reverse Side of this
Rider.

Provisions Referred to in and Made Part of this
Rider (No. 367)

“Permits.” Permission granted to make alteration or repairs to the above described building without limit of time, and to build additions, and if of like construction and communicating and in contact therewith, this policy shall cover in same under its respective items; permission also granted to do such work in said building as the nature of the occupancy may require; to work at any and all times; and, when not in violation of law or ordinance, to generate illuminating gas or vapor, and to keep and use the necessary quantities of all articles, things and materials incidental to the business conducted therein and for the operation of said building, it

being warranted by insured that no artificial light (other than incandescent electric light) be permitted in the room when the reservoir of any machine or device using petroleum or any of its products of greater inflammability than kerosene oil is being filled or drawn on. A breach of this warranty suspends this insurance during such breach. But notwithstanding anything herein contained, the use, keeping, allowing, or storing on the within described premises of dynamite, fireworks, Greek fire, gunpowder in excess of fifty pounds, nitro glycerine or other explosives is prohibited and shall wholly suspend this policy during the period such use, keeping, allowing or storing shall continue unless a specific permit therefor is attached to this policy.

“Lightning Clause.” This policy shall cover any direct loss or damage by lightning (meaning thereby the commonly accepted use of the term “lightning” and in no case to include loss or damage by cyclone, tornado or windstorm) not exceeding the sum insured nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy; Provided, however, that if there shall be any other insurance on said property this company shall be liable only *pro rata* with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

“Electrical Exemption Clause.” If dynamos, wiring, lamps, motors, switches or other electrical appliances or devices are insured by this policy,

this insurance shall not cover any immediate loss or damage to dynamos, exciters, lamps, motors, switches, or any other apparatus for generating, utilizing, testing, regulating, or distributing electricity, caused directly by electric currents therein whether artificial or natural.

Term one year from November 19, 1920, to November 19, 1921. Concurrent insurance in the following companies, viz.:

Map—Sheet 4. Block 102. Street No. 240.

Special Rate—Page —— Line ——.

Mailed Nov. 13, 1920.

VEATCH REALTY CO.,

Agent. [196]

Defendant's Exhibit No. 8B.

Every Policy or Endorsement Must be Reported
the Same Day the Order is Received.

Daily Report.

UNITED STATES

FIRE INSURANCE COMPANY

OF NEW YORK.

Pacific Department.

WM. W. ALVERSON, Manager.

266 Bush Street San Francisco.

This Space Reserved for Company's Use.

Total net line.

On Same \$. F. R. Within 100 Feet

\$. M. R. Class No.

Classification: Vol. Sheet 4. Block 102.

Amount \$1250.00. Rate 245. Premium \$30.62.

Policy No. C41418. Written in Place of No.

Renewal of No. 874799. Agency: Moscow, Idaho.
 Ledger Comn. \$. % Rate Card
 No. Line No.

Thirty and 62/100 dollars premium

Does insure Leo Brothers Company for the term of one year from the twenty-third day of September, 1920, at noon, to the twenty-third day of September, 1921, at noon. Amount: twelve hundred fifty and no/100 dollars.

Copy of Policy

Standard Forms Bureau Form 76.

BUILDING FORM (MERCANTILE)

On the following described property, all situate at No. 240 on the east side of Main Street, between "C" and "A" Streets, in Moscow, Idaho.

*1. \$250.00 On the one story shingle roof frame building and its additions (if any) of like construction communicating and in contact therewith, including foundations, sidewalks, plumbing, electrical wiring and stationary heating and lighting apparatus and fixtures; also all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales and elevators, belonging to and constituting a part of said building, only while occupied for storage of vinegar purposes.

*2. \$1000.00 On tanks, all while contained in the above described building.

*3. \$ Nil On

*No insurance attaches under any of the above items unless a certain amount is specified and inserted in the blank immediately preceding the item.

Other insurance permitted.

Loss, if any, subject however to all the terms and conditions of this policy, payable to

“Tenants’ Improvements” separately insured for a specific amount under this, or any other policy, are not covered by this policy except for such specific amount, if any, named herein.

The provisions printed on the back of this form are hereby referred to and made a part hereof.

Attached to Policy No. C41418 of the United

Name of Company

States Fire Ins. Co.

Agency at Moscow, Idaho.

Dated Sept. 21, 1920.

Trade Mark
 STANDARD

76

May 1918

INSURANCE MAP.

Sheet 4

Block 102

No. 240

FRED VEATCH, Agent.

For Other Provisions See Reverse Side of this Rider.

Provisions Referred to in and Made Part of this Rider (No. 76)

“Vacancy.” If the building described hereunder is located within the incorporate limits of a city or town, permission is hereby granted for same to remain vacant or unoccupied without limit of time.

“Permits.” Permission granted to make alteration or repairs to the above described building without limit of time, and to build additions, and if of like construction and communicating and in contact therewith, this policy shall cover on same under its respective items pertaining thereto; permission also granted to do such work in said building as the nature of the occupancy may require; to work at any and all times; and, when not in violation of law or ordinance, to generate illuminating gas or vapor, and to keep and use the necessary quantities of all articles, things and materials incidental to the business conducted therein and for the operation of said building, it being warranted by insured that no artificial light (other than incandescent electric light) be permitted in the room when the reservoir of any machine or device using petroleum or any of its products of greater inflammability than kerosene oil is being filled or drawn on. A breach of this warranty suspends this insurance during such breach. But notwithstanding anything herein contained, the use, keeping, allowing, or storing on the within described premises of dynamite, fireworks, Greek fire, gunpowder in excess of fifty pounds, nitro glycerine or other explosives is prohibited and shall wholly suspend this policy during the period such use, keeping, allowing or storing shall continue unless a specific permit therefor is attached to this policy.

“Lightning Clause.” This policy shall cover any direct loss or damage by lightning (meaning thereby the commonly accepted use of the term

“lightning” and in no case to include loss or damage by cyclone, tornado or windstorm) not exceeding the sum insured nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy; Provided, however, that if there shall be any other insurance on said property this company shall be liable only *pro rata* with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

“Electrical Exemption Clause.” If dynamos, wiring, lamps, motors, switches or other electrical appliances or devices are insured by this policy, this insurance shall not cover any immediate loss or damage to dynamos, exciters, lamps, motors, switches, or any other apparatus for generating, utilizing, testing, regulating, or distributing electricity, caused directly by electric currents therein whether artificial or natural.

Daily report mailed Sept. 21, 1920.

FRED VEATCH,
Agent. [197]

Defendant's Exhibit No. 9.

Daily Report, or Application.

NORWICH UNION FIRE INSURANCE SOCIETY, LTD.

Established 1797.

Head Office No. ———.

Moscow, Idaho, Agency. Veatch Realty Co., Agent.

Policy No. 1064. Renewal of New. Name of Assured (write it plainly) Leo Brothers Company.

Amount \$5000.00. Rate 250. Premium ~~\$225.00~~
\$125.00. Corrected to ~~\$225.00~~ \$125.00. Com-
mencement Dec. 21st, 1920. Term one year. Ex-
piration December 21st, 1921.

Map and Rate Reference: Map Sheet No. 4.
Block No. 102. Street No. 244. Rate Book Page
3. Line No. 2.

Home Office Space Risk \$. Block \$.
Re. In. \$. Re. Out. \$.

COPY OF WRITTEN PORTION OF POLICY.
Standard Forms Bureau Form 367.

MERCHANDISE AND FIXTURES FORM.

On the following described property, all situate
No. 244 on the east side of Main Street, between
“A” and “C” Streets, in Moscow, Idaho.

- *1. \$5000.00 On merchandise of every description,
consisting principally of vinegar
and vinegar stock, manufactured
or in process of manufacture, and
on materials for manufacturing
same, including packages, labels,
cases, boxes and all wrapping and
packing materials, being the prop-
erty of insured or sold but not re-
moved; and (provided the insured
shall be liable by law for loss or
damage thereto or shall have spe-
cifically assumed liability therefor),
this insurance shall also cover mer-
chandise held in trust, or on com-
mission, or left for storage or re-
pairs; all only while contained in

the three story comp. roof, brick and frame building and its additions (if any) of like construction communicating and in contact therewith, situate as above.

*2. \$ Nil On store, office and workshop furniture and fixtures and equipment; and on awnings, implements, signs and tools; and on supplies incidental to the business of insured not described under Item 1 above; all only while contained in, on or attached to above described building and its additions (if any) of like construction communicating and in contact therewith.

*3. \$ Nil On

.....

*4. \$ Nil On

.....

*No insurance attaches under any of the above items unless a certain amount is specified and inserted in the blank immediately preceding the item.

Loss or damage for which insured shall be liable by law, or for which insured shall have specifically assumed liability, under item 1 above, shall be adjusted with and payable to the insured named in this policy.

“Restriction in Case of Specific Insurance.” No article or piece of personal property separately insured for a specific amount under this, or any other policy, is covered by this policy except for such

specific amount, if any, named herein; nor shall this company be liable for loss to merchandise of others for which the insured is liable by law or shall have specifically assumed liability, on which insurance is carried by or in the name of others than the insured named in this policy.

“Sidewalk Clause.” It is understood that property above described is also covered under its respective items, on sidewalks, platforms and alleyways pertaining to above described building, only while in daily transit to and from said building.

Other insurance permitted.

The provisions printed on the back of this form are hereby referred to and made a part hereof.

Attached to Policy No. 1064 of the Norwich Union
Name of Company
Fire Ins. Co. Agency at Moscow, Idaho. Dated
December 21, 1921.

Trade Mark
STANDARD

367

May 1918

INSURANCE MAP

Sheet 4

Block 102

No. 244

VEATCH REALTY CO.,

Agent.

For Other Provisions See Reverse Side of this
Rider.

Provisions Referred to in and Made Part of this
Rider (No. 367).

“Permits.” Permission granted to make alteration or repairs to the above described building without limit of time, and to build additions, and if of

like construction and communicating and in contact therewith, this policy shall cover in same under its respective items; permission also granted to do such work in said building as the nature of the occupancy may require; to work at any and all times; and, when not in violation of law or ordinance, to generate illuminating gas or vapor, and to keep and use the necessary quantities of all articles, things and materials incidental to the business conducted therein and for the operation of said building, it being warranted by insured that no artificial light (other than incandescent electric light) be permitted in the room when the reservoir of any machine or device using petroleum or any of its products of greater inflammability than kerosene oil is being filled or drawn on. A breach of this warranty suspends this insurance during such breach. But notwithstanding anything herein contained, the use, keeping, allowing, or storing on the within described premises of dynamite, fireworks, Greek fire, gunpowder in excess of fifty pounds, nitro glycerine or other explosives is prohibited and shall wholly suspend this policy during the period such use, keeping, allowing or storing shall continue unless a specific permit therefor is attached to this policy.

“Lightning Clause.” This policy shall cover any direct loss or damage by lightning (meaning thereby the commonly accepted use of the term “lightning” and in no case to include loss or damage by cyclone, tornado or windstorm) not exceeding the sum insured nor the interest of the insured in the property, and subject in all other respects to the terms

and conditions of this policy; Provided, however, that if there shall be any other insurance on said property this company shall be liable only *pro rata* with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

“Electrical Exemption Clause.” If dynamos, wiring, lamps, motors, switches or other electrical appliances or devices are insured by this policy, this insurance shall not cover any immediate loss or damage to dynamos, exciters, lamps, motors, switches, or any other apparatus for generating, utilizing, testing, regulating, or distributing electricity, caused directly by electric currents therein whether artificial or natural.

Date Dec. 21, 1920.

VEATCH REALTY CO.,
Agent. [198]

Defendant's Exhibit No. 10.

Every Policy or Endorsement Must be Reported
the Same Day the Order is Received.

Daily Report.

**NEW BRUNSWICK FIRE INSURANCE COM-
PANY OF NEW YORK.**

Pacific Department.

WM. W. ALVERSON, Manager.

266 Bush Street San Francisco.

This Space Reserved for Company's Use.

Total Net Line.

On Same \$. F. R. Within 100 Feet
\$. M. R. Class No.
Classification: Vol. Sheet 4. Block 102.

Amount \$6000.00. Rate 250. Premium \$150.00.
Policy No. 911476. Written in Place of No.
Renewal of No. Agency Moscow, Idaho.
Ledger Comn. \$. % Rate Card No.
..... Line No.

One hundred fifty and no/100 dollars premium
Does insure Leo Brothers Company for the term of
one year from the twenty-eighth day of July, 1920,
at noon, to the twenty-eighth day of July, 1921, at
noon. Amount six thousand and no/100 dollars.

Copy of Policy.

Standard Forms Bureau Form 367.

MERCHANDISE AND FIXTURES FORM.

On the following described property, all situate
No. 244 on the southeast corner of Main and "C"
Streets, in Moscow, Idaho.

- *1. \$6000.00 On merchandise of every description,
consisting principally of cider
vinegar manufactured or in process
of manufacture, and on materials
for manufacturing same, including
packages, labels, cases, boxes and
all wrapping and packing mate-
rials, being the property of insured
or sold but not removed; and (pro-
vided the insured shall be liable by
law for loss or damage thereto or
shall have specifically assumed lia-
bility therefor), this insurance
shall also cover merchandise held
in trust, or on commission, or left
for storage or repairs; all only

while contained in the three story comp. roof, brick and one story frame building and its additions (if any) of like construction communicating and in contact therewith, situate as above.

*2. \$ Nil On store, office and workshop furniture and fixtures and equipment; and on awnings, implements, signs and tools; and on supplies incidental to the business of insured not described under Item 1 above; all only while contained in, on or attached to above described building and its additions (if any) of like construction communicating and in contact therewith.

*3. \$ Nil On

.....

*4. \$ Nil On

.....

*No insurance attaches under any of the above items unless a certain amount is specified and inserted in the blank immediately preceding the item.

Loss or damage for which insured shall be liable by law, or for which insured shall have specifically assumed liability, under item 1 above, shall be adjusted with and payable to the insured named in this policy.

“Restriction in Case of Specific Insurance.” No article or piece of personal property separately insured for a specific amount under this, or any other

policy, is covered by this policy except for such specific amount, if any, named herein; nor shall this company be liable for loss to merchandise of others for which the insured is liable by law or shall have specifically assumed liability, on which insurance is carried by or in the name of others than the insured named in this policy.

“Sidewalk Clause.” It is understood that property above described is also covered under its respective items, on sidewalks, platforms and alleyways pertaining to above described building, only while in daily transit to and from said building.

Other insurance permitted.

The provisions printed on the back of this form are hereby referred to and made a part hereof.

Attached to Policy No. 911476 of the New Brunswick Fire Ins. Co. Agency at Moscow, Idaho.
Dated July 20, 1920.

Trade Mark
STANDARD

367

May 1918

INSURANCE MAP

Sheet 4

Block 102

No. 244-“D”

FRED VEATCH, Agent.

For Other Provisions See Reverse Side of this
Rider.

Provisions Referred to in and Made Part of this
Rider (No. 367).

“Permits.” Permission granted to make alteration or repairs to the above described building without limit of time, and to build additions, and if of like construction and communicating and in con-

tact therewith, this policy shall cover in same under its respective items; permission also granted to do such work in said building as the nature of the occupancy may require; to work at any and all times; and, when not in violation of law or ordinance, to generate illuminating gas or vapor, and to keep and use the necessary quantities of all articles, things and materials incidental to the business conducted therein and for the operation of said building, it being warranted by insured that no artificial light (other than incandescent electric light) be permitted in the room when the reservoir of any machine or device using petroleum or any of its products of greater inflammability than kerosene oil is being filled or drawn on. A breach of this warranty suspends this insurance during such breach. But notwithstanding anything herein contained the use, keeping, allowing, or storing on the within described premises of dynamite, fireworks, Greek fire, gunpowder in excess of fifty pounds, nitro glycerine or other explosives is prohibited and shall wholly suspend this policy during the period such use, keeping, allowing or storing shall continue unless a specific permit therefor is attached to this policy.

“Lightning Clause.” This policy shall cover any direct loss or damage by lightning (meaning thereby the commonly accepted use of the term “lightning” and in no case to include loss or damage by cyclone, tornado or windstorm) not exceeding the sum insured nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy; Provided, however,

that if there shall be any other insurance on said property this company shall be liable only *pro rata* with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

“Electrical Exemption Clause.” If dynamos, wiring, lamps, motors, switches or other electrical appliances or devices are insured by this policy, this insurance shall not cover any immediate loss or damage to dynamos, exciters, lamps, motors, switches, or any other apparatus for generating, utilizing, testing, regulating, or distributing electricity, caused directly by electric currents therein whether artificial or natural.

Daily Report Mailed July 20, 1920.

FRED VEATCH,

Agent. [199]

In the District Court of the United States for the
District of Idaho, Central Division.

CONSOLIDATED CAUSES Nos. 784 and 785.
LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

THE NEW BRUNSWICK FIRE INSURANCE
COMPANY, a Corporation,
Defendant,

and

LEO BROTHERS COMPANY, a Corporation,
Plaintiff,

vs.

NORWICH UNION FIRE INSURANCE SO-
CIETY, LIMITED, a Corporation,
Defendant.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

I, W. D. McReynolds, clerk of the United States District Court for the District of Idaho, do hereby certify the foregoing to be a full, true and correct copy of so much of the record, papers, exhibits and other proceedings in the above-entitled causes, as the same appear of record in my office, the same constituting the record on appeal herein on the judgment of the United States District Court for the District of Idaho, Central Division, to the United States Circuit Court of Appeals, for the Ninth Circuit, as requested by counsel for the respective parties;

I further certify that the cost of preparing and certifying the foregoing records amounts to the sum of \$65.00 and that the said amount has been paid by the appellant herein.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said court, at Boise, in said district, this 8th day of November, 1923.

[Seal]

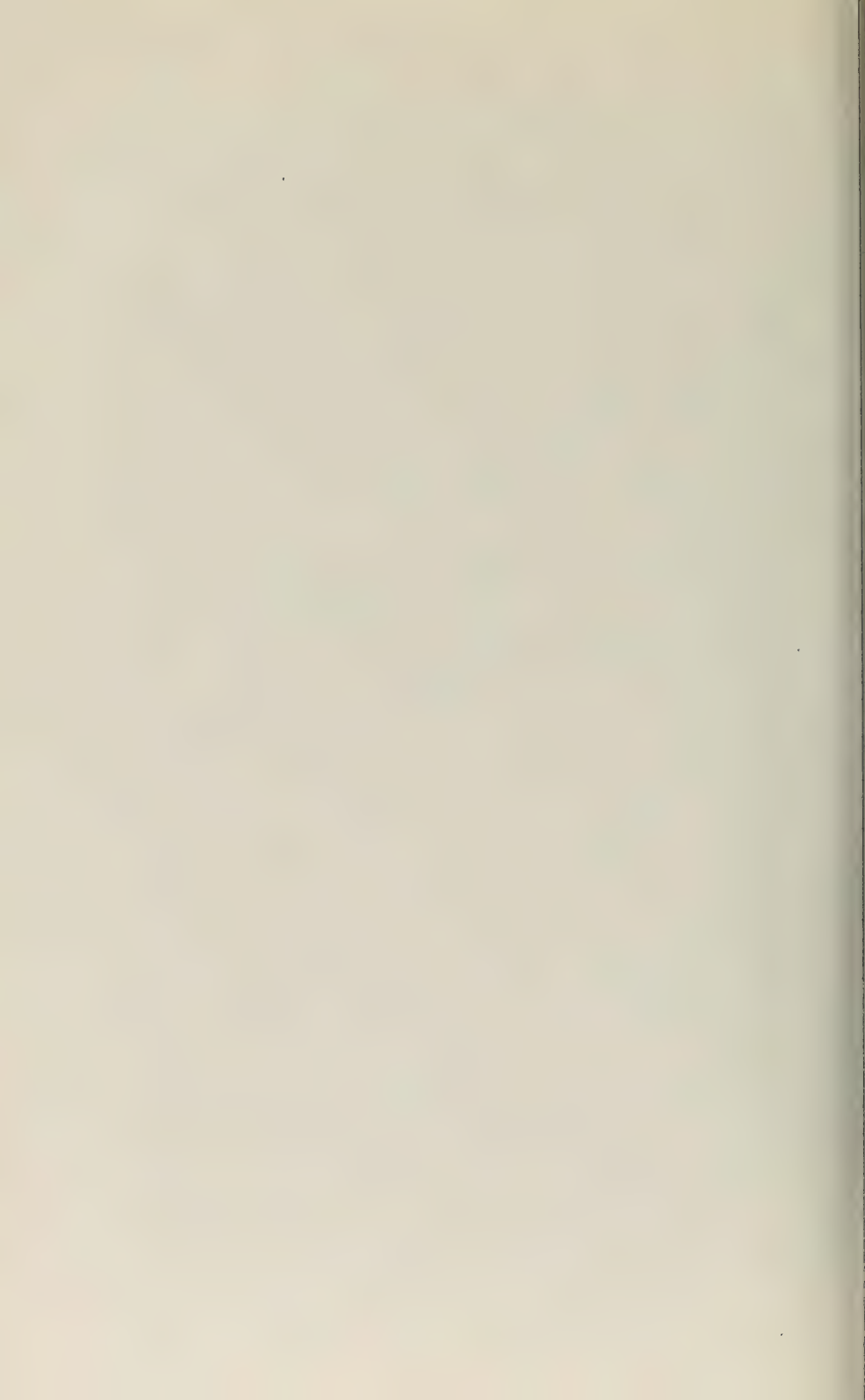
W. D. McREYNOLDS,
Clerk U. S. District Court. [200]

[Endorsed]: No. 4140. United States Circuit Court of Appeals for the Ninth Circuit. Norwich Union Fire Insurance Society, Limited, of Norwich and London, England, a Corporation, Plaintiff in Error, vs. Leo Brothers Company, a Corporation, Defendant in Error, and the New Brunswick Fire Insurance Company, a Corporation, Plaintiff in Error, vs. Leo Brothers Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writs of Error to the United States District Court of the District of Idaho, Central Division.

Filed November 12, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.



United States
Circuit Court of Appeals

For the Ninth Circuit

NORWICH UNION FIRE INSURANCE SO-
CIETY, LIMITED, of Norwich and London,
England, a Corporation,
Plaintiff in Error,

vs.

LEO BROTHERS COMPANY, a Corporation,
Defendant in Error,

and

THE NEW BRUNSWICK FIRE INSURANCE
COMPANY, a Corporation,
Plaintiff in Error,

vs.

LEO BROTHERS COMPANY, a Corporation,
Defendant in Error,

Upon Writs of Error to the United States District Court
of the District of Idaho, Central Division

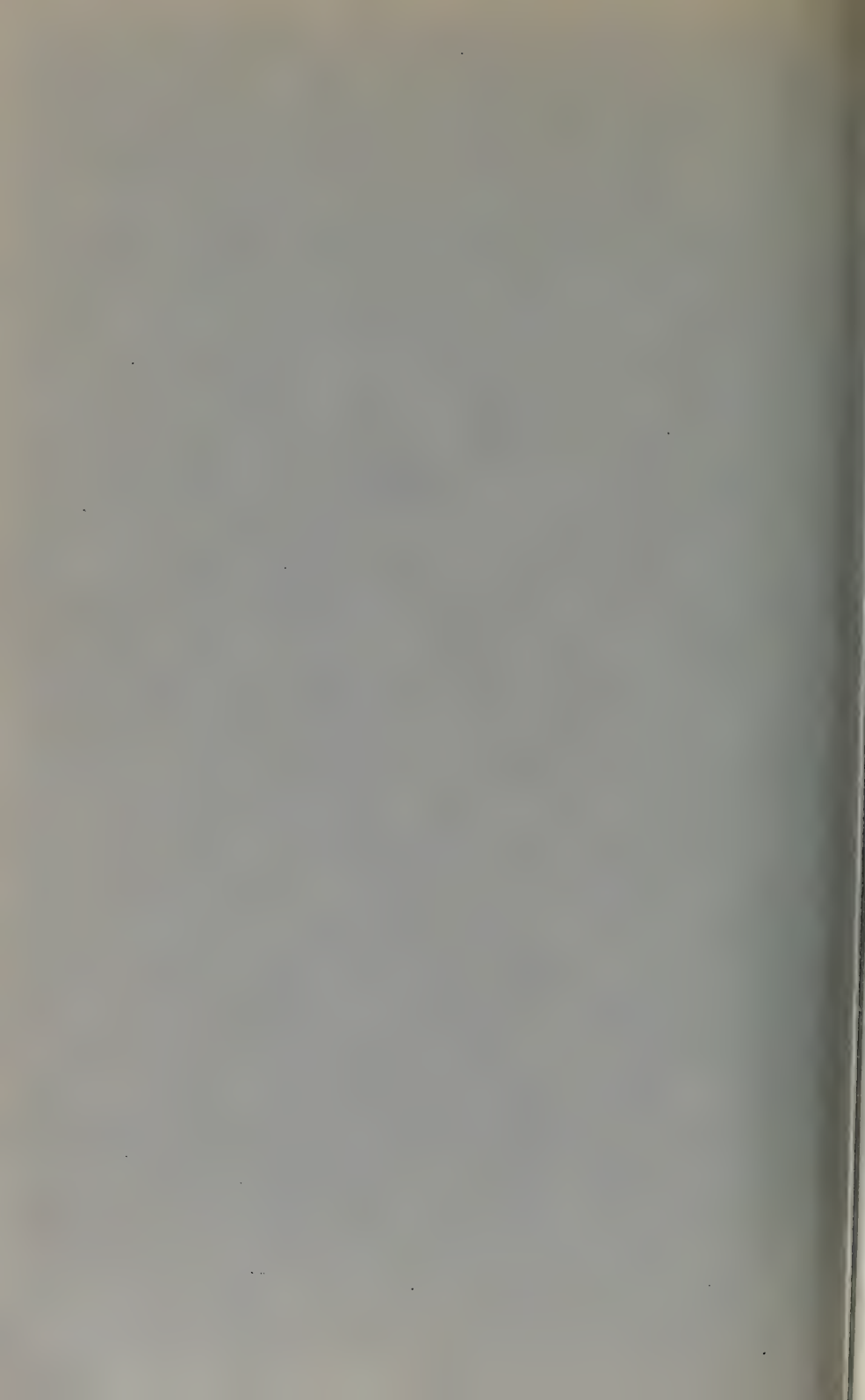
PLAINTIFFS IN ERROR' OPENING BRIEF.

E. EUGENE DAVIS,
Spokane, Wash.

C. J. ORLAND,
Moscow, Idaho.

H. B. M. MILLER,
San Francisco, Cal.

Attorneys for Plaintiff in Error.



NO. 4140

United States
Circuit Court of Appeals
For the Ninth Circuit

NORWICH UNION FIRE INSURANCE SOCIETY, LIMITED, of Norwich and London, England, a Corporation,
Plaintiff in Error,

vs.

LEO BROTHERS COMPANY, a Corporation,
Defendant in Error,
and

THE NEW BRUNSWICK FIRE INSURANCE COMPANY, a Corporation,
Plaintiff in Error,

vs.

LEO BROTHERS COMPANY, a Corporation,
Defendant in Error,

Upon Writs of Error to the United States District Court
of the District of Idaho, Central Division

PLAINTIFFS IN ERROR' OPENING BRIEF.

E. EUGENE DAVIS,
Spokane, Wash.

C. J. ORLAND,
Moscow, Idaho.

H. B. M. MILLER,
San Francisco, Cal.
Attorneys for Plaintiff in Error.

STATEMENT OF THE CASE.

These were two separate actions consolidated for trial before the court without a jury. Plaintiffs in Error were defendants in the lower court and defendant in error was plaintiff in both cases and for convenience will be so designated in this brief.

Plaintiff is an Idaho corporation, engaged in the manufacture of vinegar at Moscow, Idaho, its principal place of business. Defendants are each foreign corporations, engaged in fire insurance underwriting and doing business in the State of Idaho and this litigation arises out of a disagreement as to the construction and application of two separate contracts of insurance entered into between plaintiff on the one part and the two defendants respectively, on the other.

One Fred Veatch was and had been for many years, agent for the two defendants, among other insurance companies, representing them at Moscow, Idaho, in the making of contracts of insurance. He was also at all times material here, the owner of most of the stock in and the active manager of plaintiff corporation; in fact, it is admitted that so far as the insurance was concerned, Fred Veatch was Leo Brothers. (Tr. 48, 95.) Defendants were aware of Veatch's relationship with plaintiff at the times the contracts of insurance were entered into.

Leo Brothers Company, represented by Mr. Veatch, was and had been for several years, the

owner of a plant for the manufacture of vinegar in Moscow, Idaho. Originally this plant had consisted of the main manufacturing plant, a three-story brick structure with a one-story frame addition to the north, situate in Block 102, on the southeast corner of the intersection of Main and C streets in the city of Moscow, in which building the machinery for the manufacture and storage of vinegar was located, and of a small detached frame building about thirty-five feet south of this building, abutting on Main street, containing tanks for the storage of vinegar. At a time prior to the time when the contracts here involved were entered into, plaintiff had had the one-story frame addition to the north of the main building torn down and a two-story frame addition added to the north of the brick and a large one-story frame addition added to the east. At the east end of this one-story frame addition, on its south side, was built a small canopy or shed roof, covering a scale and scale platform, resting on the north side on the frame addition and on the south side on two posts. Some time after these improvements, the small detached frame building to the south of the main building was enlarged and built up toward the north and east, bringing its north walls to within about sixteen feet of the factory building. A concrete driveway separated the two buildings. When this was done, the canopy shed was attached on its south side to this building, this being the only physical connection between the two

buildings. This was the condition of the property at the time the contracts of insurance in controversy were entered into and at the time of the fire. (Diagram, Tr. 229.)

As agent for various insurance companies, Mr. Veatch acted under well defined and restricted instructions from his principals. He was furnished with maps prepared by the Sanborn Map Company, showing the location of all insurable risks in the city of Moscow. The diagram (Tr., page 229) is a re-production of the Sanborn Map page whereon Leo Brothers Company factory and storage building are shown. Opposite the factory proper, the map maker had placed on this map the number 244, which was the city or mail delivery number, but the map maker placed no number opposite the building containing the storage tanks. Mr. Veatch, however, for reference in writing insurance, had written on the map in his office in lead pencil, the number 240, as he had figured that this would be about a correct number for this location. (Tr. 74, 99.)

All insurance risks in the city of Moscow were surveyed by experts of the Board of Fire Underwriters, an organization of Salt Lake City, Utah, of which organization defendants were members. These experts classified various buildings of the city and their contents, located and segregated the various risks or subjects of insurance and published specific rates for insurance thereon. (De-

fendants' Exhibit 19.) It also published a book of general estimates, basis rates (Defendants' Exhibit 18), for the use of agents in the field so they could write a risk which had not been specifically rated, pending authorization of specific rating by the board. (Tr. 129.) This book also contained general rules for the guidance of agents. These surveys and rates, as well as the tariff book of general estimates and values were placed in the hands of the various insurance company members of the board and their agents and constituted rules and instructions for the agents' guidance in writing insurance which could not be deviated from. (Tr. 87, 88.) When a specific rate had been published, that rate identified the particular risk or subject of insurance and the agent was not permitted to adopt or apply any other rate or deviate from this construction. (Tr. 87.) Under the rules in force, separate risks could not be insured under one sum in a policy. (Tr. 88, 130, Defs. Ex. 18), except in cases where an average clause was applicable and it is conceded that the average clause was not applicable in the present case and was not used or intended to be used. (Tr. 87.)

When block 102, wherein the plant in question was located, was surveyed, the result was furnished to Mr. Veatch and the various insurance companies he represented and made a part of the book of the specific rates of Moscow. (Def. Ex. 19 and 7.) The survey and rating of plaintiff's plant was desig-

nated as page 3 of said book and the material portion was as follows. (Defs. Ex. 7, Tr. p. 231):

Correction Sheet No. 60
April 7, 1921

MAIN STREET—EAST SIDE

| No. of Rating | Location | Class | Occupation | Bldg. | Cents | Moscow, Idaho P-3 | |
|------------------|----------------------------|-------|-----------------|-------|-------|-------------------|-----------------|
| | | | | | | Rating | Takes Effect |
| 1 | C and A. Streets—Block 102 | | | | | | |
| 2 | SE c C (244)..... | C-D | Vinegar Factory | 250 | 250 | | |
| 3 | South | D | Vinegar Tanks | 245 | 245 | Oct. | 15-19 |
| 4 | South (224) | D | *Warehouse | 340 | 340 | April | 1-20 |
| 5 | South (210)..... | C | Office | 100 | 100 | | |
| 6 | NE c A (200)..... | C | Dwelling | 45 | 45 | | |

The line numbered (1) of this sheet identifies the block. (Tr. 53.) The line numbered (2) identifies the risk known as the vinegar factory proper and by this means classifies it and fixes it as a distinct risk or subject of insurance (Tr. p. 89) and the line numbered (3) identifies and fixes the vinegar tanks and contents as a separate risk. (Tr. 53, 115.) The word "south" used as descriptive in this line (3) is the conventional term known to insurance men and understood as referring to the building or risk just south of the risk designated in the previous line and is used to designate a risk when no number is given to the building on the map in use or fixed by the municipal authorities. (Tr. 53, 115.)

Mr. Veatch as agent for defendants and other companies, was furnished by these companies with blank standard form policies and with other blanks called daily reports for use in reporting to his principals a policy when written. The rule was to prepare in triplicate a descriptive sheet, describing the

property to be insured, attach one copy of this to the policy, another copy to the agent's record and to attach the third copy to the daily report form and send the daily report with the descriptive clause attached, to the home office or general agency of the company. (Tr. 49, 50.) Upon this daily report form were appropriate blanks for reference to the proper page and line number of the specific rates and for reference to the fire maps of the risk. (Tr. 51.) The contract thus presented to the insurance companies was for a risk based upon the standard policy form and the typed description of the property, the insurance companies' copy of the Sanborn Map and of the rate sheets with reference to which the companies necessarily assumed the policies were written and the tariff book and book of rules in their hands and in the hands of their agents in conformity with which rules they of necessity assumed that the agent had written the policies.

In writing the contracts of insurance which are the subject of these suits, Mr. Veatch as principal owner and manager of plaintiff corporation had no communication whatsoever with anyone connected with defendants except such information as he conveyed to defendant companies by way of the daily reports and rate and map references. (Tr. 48.) As to the plaintiff, as was admitted, he was Leo Brothers Company and no communication was

necessary. The original policies never left his hands.

For several years prior to the date of the present contracts, Mr. Veatch had written two separate groups of insurance policies covering the vinegar plant. One group described the property covered as on the building or its contents known as number 244 on the southeast corner of Main and C streets, Moscow, Idaho, and the other group described the property insured as the building or contents (as the case may be) known as number 240 on the east side of Main street between A and C streets. This was both before and after the improvements to the property above referred to were made. These policies were reported to the various insurance companies including these defendants by daily reports and references as above described.

On December 21, 1920, Mr. Veatch prepared a policy which, omitting immaterial parts, bound the Norwich Union Fire Insurance Society, Limited, for a term of one year to insure plaintiff against loss by fire "to the following described property while located and contained as described herein and not elsewhere, to-wit" (Tr. 7):

Standard Farms Bureau Form 367 (May 1918).

MERCHANDISE AND FIXTURES FORM.

On the following described property, all situate at No. 244 on the East side of Main Street, between "A" and "C" Streets, in Moscow, Idaho.

*1 \$5000.00 On merchandise of every description, consisting principally of Vinegar and Vinegar stock manufactured or in process of manufacture, and on materials for manufacturing same, including packages, labels, cases, boxes and all wrapping and packing materials, being the property of insured or sold but not removed; * * * all only while contained in the three-story comp. roof, brick & frame building and its additions (if any) of like construction communicating and in contact therewith, situate as above.

This form was attached to the daily report blank of the Norwich Union Fire Insurance Society and transmitted to its general agent. On this daily report form, Mr. Veatch further designated the risk by reference to the page and line of the book of specific rates as page (3), line (2) and also referred the company to the risk known as number 244 in block 102 on the insurance maps. (Defts. Ex. 9. Tr. 249.) On July 28, 1920, Mr. Veatch prepared a policy which, omitting immaterial parts, bound the New Brunswick Fire Insurance Company to insure plaintiff for the term of one year against loss by fire "to the following described property while located and contained as described herein and not elsewhere, to-wit:"

Standard Farms Bureau Form 367 (May 1918).

MERCHANDISE AND FIXTURES FORM.

On the following described property, all situate No. 244 on the Southeast corner of Main and "C" Streets, in Moscow, Idaho:

- * \$6000.00 On merchandise of every description, consisting principally of Cider Vinegar manufactured or in process of manufacture, and on materials from manufacturing same, including packages, labels, cases, boxes and all wrapping and packing materials, being the property of insured or sold but not removed; * * * all only while contained in the three-story comp. roof, brick & one-story frame building and its additions (if any) of like construction communicating and in contact therewith, situate as above.
(Tr. pp. 187-188.)

This policy was prepared in the same manner and copy of the form attached, attached to the daily report and reported to the general agent for defendant New Brunswick Fire Insurance Company at San Francisco, one W. W. Alverson. This daily report contained the same references as to map number (Defts. Ex. 10, Tr. 254), but the rate book reference apparently, from Mr. Veatch's copy introduced in evidence, was left blank, although he testified that this might have been filled in in the copy sent to the company, but if the blanks were not filled in, they should have been. The rate of 250 being the rate for the risk on line (2), page 3, of the specific rates and for the main plant, was indicated on the daily report.

At the time this policy was reported and at the time of the fire, there was insurance on the vinegar tank risk which Mr. Veatch had written, binding the United States Fire Insurance Company of which he was agent and this same Mr. Alverson, general agent, which policy he had reported to Mr. Alverson by daily report and in which policy he had insured the risk referred to as the vinegar tank shed risk and describing it as number 240 on the east side of Main street between "A" and "C" street and referred to it as the risk shown on the insurance map as number 240. (Defts. Ex. 8B, Tr. 245.)

He had also about this same time and in the same manner, written policies binding the Home Insurance Company with two policies and the Liverpool, London & Globe Insurance Company with one policy, for both of which companies he was agent, for \$10,000.00 each for loss of vinegar all only while contained in the property situate at number 240 on the east side of Main Street between "A" and "C" Streets, reporting them in the same manner and referring to the risks as number 240 on the insurance map.

A fire occurred on the 6th day of July, 1921, damaging the vinegar located and contained in the risk referred to as number 240, the vinegar tank shed, to the extent of \$19,561.00. The \$20,000.00 insurance in the Home Insurance Company and the Liverpool, London & Globe Insurance Company ad-

mittedly covered this loss, having been specifically designated as covering the risk, but plaintiff contending that the policies of defendants also covered and should pro-rate with this insurance and with defendants contending that their policies covered only the vinegar in the main factory proper or number 244, this litigation resulted. From a decision of the District Court upholding plaintiff's contention, this Writ of Error is prosecuted.

SPECIFICATIONS OF ERROR.

There was error:

I.

In deciding that the property destroyed by fire was insured under the policies of insurance sued on in the plaintiff's complaints.

II.

In denying the defendants' motion for judgment at the close of plaintiff's case.

III.

In denying defendants' motion for judgment at the close of the entire case.

IV.

In refusing to make findings for defendants as requested at the close of the entire case.

V.

In entering judgment for plaintiff in any sum.

VI.

In deciding that there was any evidence or inference therefrom that the property destroyed was located or contained in the building described in the policies sued on as Block 102, No. 244, Sanborn Map.

VII.

In construing the agreements of the parties as contracts of insurance of the contents of the building known as "Vinegar Tank Shed" referred to as Risk 240.

VIII.

In deciding that the building, the contents of which were destroyed, was the same building or part thereof, as the building known and described as No. 244, Block 102, Sanborn Map.

IX.

In not deciding that the two buildings were separate and distinct risks and that the building and contents destroyed were not insured under the contracts of insurance sued on in plaintiff's complaint.

X.

In deciding that there was any evidence or inference therefrom that the property destroyed was located or contained in the building described in the policies sued on as Block 102, No. 244, Sanborn Map, on the S. E. corner of Main and "C" Streets, Moscow.

ARGUMENT.

The single question involved in this appeal is whether the property destroyed was covered by defendants' contracts of insurance or stated otherwise, whether the contracts of insurance insured the vinegar, the contents of the building designated as the vinegar tanks building and referred to as number 240, it being admitted that the vinegar in this building was the only vinegar destroyed. All the specifications of error go substantially to this one question and in argument must necessarily be treated as a whole.

At the outset, we wish to point out that there was absolutely no dispute as to the facts on this point, the only controversy being as to the application of the law to these facts. In fact, the entire case except as to the amount of loss on which no question is raised, is based entirely upon the testimony of plaintiff's witness, Mr. Veatch, plaintiff's manager and upon certain uncontroverted and unimpeached documentary evidence and the uncontroverted and

unimpeached expert testimony of defendants' witness Wooley, whose testimony was in the most part merely cumulative and explanatory of certain portions of Mr. Veatch's testimony and we believe that when these facts are analyzed and the proper rules of law applied, it will be seen that there is absolutely no evidence or inference therefrom to sustain the judgment of the District Court.

It seems that in approaching a discussion of the question raised, that the first point to consider is what transaction created the insurance contracts, that is, gave rise to contractual rights and duties between the parties. Bearing in mind that Mr. Veatch, although defendants' agent, was the plaintiff's manager and chief stockholder, in substance the plaintiff itself and the sole actor for plaintiff in this transaction and further that he wrote these policies without any previous authorization or communication whatsoever, it is manifest that when he wrote the policies themselves and kept them in his possession, no contract arose. The only communication that he ever had with defendants regarding this insurance was such as he conveyed to them in the daily reports (Defts. Ex. 9 and 10, Tr. 249-259) together with the rate book and map reference thereon. The contract thus presented, was accepted by the defendants, but no contract other than the one so presented was ever tendered and there was no communication or meeting of the minds other

than upon the contract with its references as thus tendered by the daily report. This being the contract and on this point we believe there can be no question, this contract must be interpreted, giving effect to all its parts which of necessity includes the rate reference, the map reference and the rules under which the insurance was necessarily written.

There is no question here of defendants asking for any reformation of a policy or introducing evidence to vary the terms of the written contract. The contract of the parties is the contract thus created by the tender of the risk on the one hand by means of the daily report and references and the acceptance on the other and the court must of necessity resort to extrinsic evidence for the purpose of applying the contract to its subject matter. The court may also by means of extrinsic evidence, place itself in the position of the parties at the time the contract was entered into for a better understanding and interpretation of the contract.

“Where the question is whether the property destroyed by fire is embraced within the terms of the policy, it is always competent in contracts of doubtful interpretation to give evidence of extrinsic facts which will place the court in the situation of the parties when the contract is made in order to enable it to be read understandingly.”

*Arlington Mfg. Co. vs. Norwich Union
Fire Insurance Society*, 107 Fed. 662.

In the present case, regardless of the physical aspects of the property, the evidence is clear and undisputed as we will hereafter demonstrate, that the parties had constituted the two buildings in question as two separate and distinct risks or subjects of insurance. The property destroyed was the property contained in the risk referred to as the vinegar tank shed or in the building referred to as number 240. The first point of law therefore is raised by the question of whether under the contract as entered into, the property destroyed, to-wit, the vinegar, was insured while in any other location except the location agreed upon by the parties. On this point we believe that under the standard form of policy, there can be no question. The standard form provides that the property is insured "while located and contained as described herein and not elsewhere," and the form proposed by plaintiff to defendants also provided "all only while contained in the three-story comp. roof, etc., situate as above."

Under a contract of this form there can be no recovery for property destroyed in any other place than that specified and described.

Davison v. London & Lancashire Ins. Co.,
189 Pa. St. 132, 42 Atl. Rep. 2.

L'Anse v. Fire Assoc., 119 Mich. 427, 78
N.W. Rep. 465.

Benton v. Farmers' Ins. Co., 102 Mich. 281,
60 N. W. Rep. 691.

- Lakings v. Phoenix Ins. Co.*, 94 Iowa, 476,
62 N. W. Rep. 783.
- Green v. Liverpool, L. & G. Ins. Co.*, 91
Iowa, 615, 60 N. W. Rep. 189.
- British-American Assur. Co. v. Miller*, 91
Tex., 414, 44 S. W. Rep. 60.
- Birnstein v. Stuyvesant Ins. Co.*, 83 App.
Div. 436, 82 N. Y. Supp. 140.
- Saunders v. Agricultural Ins. Co.*, 2 App.
Div. 223, 37 N. Y. Supp. 769.
- Bahr v. National Ins. Co.*, 80 Hun. 309, 29
N. Y. Supp. 1031.
- Leventhal v. Home Ins. Co.*, 32 Misc. 685,
66 N. Y. Supp. 502.
- Phoenix Ins. Co. v. Stewart*, 53 Ill. App.
273.
- Lyons v. Providence-Washington Ins. Co.*,
14 R. L. 109.
- Eaton v. Phoenix Ins. Co.*, 15 Ky. L. R. 441.
- Bryce v. Lorillard Ins. Co.*, 55 N. Y. 240.
- Maryland Ins. Co. v. Gusdorf*, 43 Md. 506.
- Bradbury v. Fire Assoc.*, 80 Me. 396, 15
Atl. Rep. 34.
- Farmers' Ins. Assoc. v. Kryder*, 5 Ind.
App. 430.
- Boyd v. Mississippi Home Ins. Co.*, 75 Miss.
47, 21 So. Rep. 708.
- Aetna Ins. Co. v. Brannon*, Tex. Civ. App.,
81 S. W. Rep. 560.
- Globe Fire Ins. Co. v. Moffat*, 154 Fed. 13.

Steil v. Sun Ins. Co., 171 Cal. 795, 155 Pac. 72.

Bear v. Natl. Fire, 29 N. Y. S. 1031.

Turning then to the contract of the parties, the question is, in what location did the parties agree that this vinegar would be covered? If the two buildings were distinct and separate locations, by agreement of the parties it is clear that the insurance did not cover in both. Taking first the physical aspects of the property without considering any agreement or understanding of the parties as to the subject matter, we find that the vinegar tank shed, number 240 and the factory building proper, number 244, had for many years been separate and detached buildings. Some time before the contracts, the tank shed had been enlarged up to about 17 feet of the other building, being divided by a driveway and connected only by a gate at one end and by a shed covering over the scales at the other. This slight physical connection of the two buildings could hardly constitute the smaller an addition. However, this point is not material, for regardless of the physical features, the undisputed evidence by plaintiff's own admissions is that the parties agreed and considered these two structures as separate locations or risks and regarded them as distinct and separate buildings or subjects of insurance.

This is clearly the position plaintiff took when proposing the insurance to defendants and the basis

upon which defendants accepted plaintiff's proposal and the situation at the time the contract was entered into is what must control and not what one of the parties might now say he intended.

"It can make no difference in the result what was intended by either party, nor can the contract be changed or modified by what one party may now say he intended. It all depends upon what was said and done at the time. If no contract was then made it cannot be made now post-facto.

"A contract, express or implied, executed or executory, results from the concurrences of minds of two or more persons, and its legal consequences are not dependent upon the impressions or understanding of one alone of the parties to it. It is not what either thinks, but what both agree.

"When the terms of an agreement are ascertained, its effect is determined by the law, and does not depend upon the uncertain or undisclosed notion or belief of either of the parties."

Roberta v. Royal Insurance Company, 76 S. E. 865.

Assuming for the sake of argument that physically these two building were one, this fact would have no bearing upon the application of insurance to the risk if the parties themselves for insurance purposes had agreed or considered them separate risks or locations. The case of *Stanton v. Rochester German Underwriters Agency*, 206 Fed. 978, decided by Judge Rudkin while on the district bench,

is well in point. In that case there was but one entire building broken up into several apartments. The policy provided that the insurance should attach to each of these buildings and contents in certain proportions. The contention was made that inasmuch as there was but one building this clause could not be applied. Judge Rudkin, however, said:

“The plain meaning of all this is that the cold storage, the lard, the smoke building, etc., described in item No. 1 are each and all separate and distinct subjects of insurance and that the amount of the policy was to be applied proportionately in event of loss. It may seem a misnomer to call these separate parts or departments of one entire plant a building; but in entering into contracts parties have a right to adopt their own nomenclature, and if the language used is plain and free from ambiguity the courts have no alternative but to enforce the contract as they find it.”

Now the parties here so considered these two buildings separate and distinct locations and risks and their contents separate and distinct subjects of insurance. Written rules were promulgated to that effect and plaintiff by his own admissions interpreted these rules in that light. We have only to go to Mr. Veatch's own admissions on the stand to find that this was clearly the understanding of the parties. Mr. Veatch, after explaining the manner in which the risks were arrived at and the specific rates published and after testifying that he was bound by the construction thus adopted, referring to plaintiff's exhibit 7, testified: (Tr. 53)

“Q. Number two says, southeast corner ‘C’ 244, C D vinegar factory, 250—or vinegar factory, 250, 250. The first 250 refers to the rate on the building? A. Yes. sir.

Q. And the second refers to the rate on the contents? A. Yes, sir.

Q. Line 3 of this rate book says, south—what does that mean? Does that refer to the risk south of the southeast corner? A. It means next south.

Q. D vinegar tanks, building 245, contents 245. That refers to the vinegar tank risk? A. Yes, sir. (42.)

Q. And the contents? A. Yes, sir.”
And again, (Tr. 76-77):

“Q. Now, you have no authority to change rates? A. Absolutely no, sir. (63.)

Q. You are bound by the rating schedules? A. Yes, sir.

Q. And I believe you testified that you had no intention or never had at any time applied the co-insurance or reduced rate average clause? A. No sir, we never have.

Q. You insured two risks specifically? A. The Home of New York and the Liverpool & London & Globe, yes, sir.

Q. And also the New Brunswick and the Norwich Union? A. That wasn’t so intended but—

Q. But that is the way you wrote it? A. Yes, sir.

Q. You applied the specific rate? A. Yes, sir.

Q. Referring to your companies you noted to these companies when you applied these rates, you noted the particular reference to the particular rates? A. Yes, sir.

Q. They then would know what you were referring to? That was your only means of communicating the manner in which you applied the rates? A. Yes, sir."

And again, (Tr. 78):

"Q. And in all those policies you applied the rate on the property that you described as 240, you described the rate on line 3, page 3? A. Yes, sir.

Q. Took the rate described in the risk at line 3, page 3? A. Yes, sir, on the contents of the tanks.

Q. And on the property described as 244 you always described the rate used on line 2, page 3, of the specific rates? A. Yes, sir."

And again, still referring to this exhibit, (Tr. 114-115):

"Q. On the left-hand side all these are buildings; where that says, southeast corner 'C' Street, that means the building on the southeast corner of 'C' Street, is that not correct? A. Yes, sir.

Q. And where it says south, that means the building just south? A. Not necessarily. The building south of it is a number.

Q. But if there is no number on the Sanborn map, and there doesn't happen to be a number, they refer to it as south, and that means the building south, does it not? A. Yes."

These are all admissions of plaintiff in the record and show how clear and emphatic was the evidence and how unquestioned was the agreement or understanding of the parties that the subject of insurance designated as 244 on the southeast corner of Main and "C" streets was a separate and distinct risk or subject of insurance from the risk shown as the vinegar tank risk and designated as 240. Other admissions by Mr. Veatch clearly corroborated this. It was admitted that other policies had been written covering the vinegar tank risk as a separate risk and designated as number 240 in other companies, both as to the building and contents. While the trial court in his opinion made the observation that it was not shown that defendants knew of this other insurance and could not have been influenced thereby, this observation, though hardly accurate as will be noted, shows the misconception of the situation. The other insurance, whether known to these defendants or not, clearly demonstrated the construction that Mr. Veatch, in writing the insurance, had placed upon the rules and agreement of the parties. It showed that he knew and understood 240 to be a separate subject of insurance from 244. Moreover, it was admitted by him that one contract on the risk at the time of the fire was with the United States Fire Insurance Company, that W. W. Alverson was the general agent of this company and was also the general agent of the defendant New Brunswick Fire In-

insurance Company and that he had reported both risks to Mr. Alverson. The risk tendered for the United States Fire Insurance Company was for insurance on the building and contents known as 240 Main Street and described in line 3, page 3 of the specific rates, while the risk tendered to defendant New Brunswick Fire Insurance Company was the risk known as 244 on the southeast corner of Main and "C" street and described on line 2, page 3, of the specific rates of Moscow. It being thus shown and without a doubt and without a scintilla of evidence to the contrary that the parties regarded 244 and its contents as separate and distinct from 240 or the vinegar tank risk, the situation in reference to the entering into the contract is as though Mr. Veatch, when tendering his daily reports had said, "There are two risks in Leo Brothers plant; the one designated on line 2, page 3 of the specific rates of Moscow and known as number 244 on the southeast corner of Main and "C" street and the other designated on line (3) page 3 of the specific rates of Moscow and known as the risk just south of 244. This policy covers the risk designated on line (2) page 3." Had the communication been couched in this form, there could be no possible doubt that the present policies did not cover the contents of the vinegar tank shed or risk designated on line 3, page 3, as stated above and in view of this evidence, this is the only construction that can be placed upon the communication.

The contention first made by plaintiff in the presentation of its case was that he understood that the words "additions communicating or in contact therewith," enabled him to claim that policies covering the contents of 244 extended over and covered the vinegar tank risk. Such a position, of course, is not tenable. If, as demonstrated above, these buildings were separate and distinct risks or subject of insurance by agreement, neither could be an addition to the other. Moreover, in view of the admissions by Mr. Veatch that a specific classification and rate identified the specific risk, neither was part of the other. This position unquestionably had no merit, as is well illustrated by the following questions propounded by the court to Mr. Veatch and his answers: (Tr. 112-113)

"THE COURT: I don't believe either one of you quite understand the question in my mind. When you send in a report of a policy on 244, how is the company to know what that policy, even though it carries the rate \$2.50, which you have suggested, how is the company to know that it extends to this shed and the contents of this shed?

A. The form of the policy reads, 'and its additions, communicating or in contact therewith.'

THE COURT: Isn't that true also of the 240 policy?

A. Yes, sir. The only way they could get at that would be by reference to their rate book. That says, 'line 3, tank sheds.'

THE COURT: Then, if the rate is the criterion, a rate of \$2.45 in one case and a rate of \$2.50 in the other, and a policy—two policies come in, with the same description, one carrying \$2.45 and one \$2.50, why wouldn't they naturally conclude that one is limited to the property on the corner and the other is limited to the property to the south?

A. I can't—I don't know."

Moreover, as is shown by the elementary rule cited from the case of *Roberta v. Royal Insurance Company*, *supra*, it was incompetent for Mr. Veatch to say what he intended or understood in his own mind the coverage to be. It was not what he had in his own mind, but what he did and communicated to the other party, to-wit, the defendants, that counted, and what he did and communicated is demonstrated by the following testimony: (Tr. 77)

"Q. You insured two risks specifically?

A. The Home of New York and the Liverpool & London & Globe, yes, sir.

Q. And also the New Brunswick and the Norwich Union?

A. That wasn't so intended but—

Q. But that is the way you wrote it?

A. Yes, sir.

Q. You applied the specific rate?

A. Yes, sir.

It is apparent, however, that this position was abandoned and plaintiff's final position taken that

the policies insuring the contents of 244 were blanket policies covering not only 244 but extending over and covering the contents of 240 also and it was upon this point that in our opinion, the District Court made the prime error in reasoning that resulted finally in his erroneous decision. In the first place, by the clear language of the contracts proposed, the insurance was specifically limited to the vinegar only while located and contained in 244 and not elsewhere and when it was admitted that 240 or the vinegar tanks was not 244, but was separate and distinct from it, this language clearly limits the insurance to the property while in 244 and at no other time or in no other place, and manifestly where the contract thus limited the insurance to the property while contained only in a specific place, a blanket coverage covering at some other place or places could not be inferred.

The testimony is clear and undisputed that the rules under which the parties operated, prohibited the writing of insurance under a blanket policy covering under one sum separate or distinct risks or items of hazard without the use of a co-insurance or reduced rate average clause and Mr. Veatch testified that the average clause was not applicable to these risks, had never been used and that he had not intended its use here. Mr. Veatch's testimony makes it very clear that the rules he operated under, forbid the blanket coverage which the Trial

Court seemed to find as the real reason for his decision. Mr. Veatch says: (Tr. 87-88)

“Q. You are familiar with the rule for applying co-insurance reduced rate average clause?

A. Yes, sir.

Q. And you testified that that was never contemplated, or had never been applied in this risk?

A. No, sir, never.

Q. Now, taking into consideration all those things, and your experience of many years as an insurance man, do you know of any way in which the vinegar tank shed, taking into consideration that rating schedule, and the factory building, 244, could have been written under one coverage in a policy?

A. I think so, under the printed forms that the boards put out.

Q. And following those instructions, do you know of any way that you could arrive at the two risks under one coverage, and still adhere to the instructions and the rates? I believe you testified on the former trial that there was none, (74) did you not?

A. That there was what?

Q. That you knew of no way except by the reduced rate average?

A. Yes, the reduced rate average.

Q. That is the only way that they could be covered under one coverage?

A. If they were two buildings that would be true, yes.”

And again referring to the same subject, (Tr. 91 and 92):

“Q. Then, Mr. Veatch, let me read this from your testimony in the former trial. I said: ‘And where there is a rate fixed for a certain risk, that applies to the entire risk?’ ‘I think that is correct. I think there are some exceptions to that rule.’ ‘You are referring to the average clause, but you have never used the average clause in writing this particular kind of risk?’ ‘No, sir.’ ‘The average clause has no bearing on this particular kind of case?’ ‘No, sir.’ ‘You identify to your principals the particular insurance you desire, or that you are binding with them, as a single particular risk in all cases? In other words, you never write two separate risks at separate rates, in one policy?’ ‘No, sir.’ ‘That cannot be done, according to your rules or the rules of your principals?’ ‘I don’t think so. I have never done it, anyhow, or attempted to do it.’ That was your testimony in the former trial, was it not?

A. Yes, sir, and that is still correct.

Q. That was your belief at that time, and that is your belief now?

A. It is my belief now, yes, sir.”

And later when his counsel had switched to this position of blanket coverage, he says: (Tr. 114)

“Q. Mr. Veatch, you have these rate books, which are your only instructions. Will you find in there any place that authorizes the writing of blanket coverage where there are two specific rates given by the rating bureau?

A. I don’t think I could in any limited time. I don’t know whether I could at all.

Q. You are not familiar with any such rules as authorize that, anyway? (98)

A. No, sir."

Defendants' witness Wooley (Tr. 130) amply corroborates this testimony of Mr. Veatch, testifying positively that such blanket coverage was prohibited, citing the rule referred to in the District Court's opinion which reads as follows:

"A blanket policy, covering under one sum separate or distinct risks or items of hazard, is hereby prohibited except as follows: Policies covering under one sum merchandise contained in frame, brick, or stone warehouses, elevators, canneries, packing houses or wineries and on their adjoining platforms, or in cars alongside or within 300 feet thereof, shall be considered as complying with the above rule requiring different items of hazard to be specifically insured."

As noted above, it was in construing this rule and the testimony relative thereto that the trial court overlooked the important and uncontradicted testimony of the interpretations the parties themselves had put upon the rule and by the simple process of transposing a portion of the rule, adopted an interpretation that led him into his erroneous conclusion, notwithstanding the fact that by the clear language of the contracts used, limiting the insurance to a specific risk, it would have made no difference whether such a rule was in existence or not. However, the rule itself is clear. Such a blanket policy

as the trial court made for the parties in place of the contract they themselves had adopted, was absolutely prohibited by any possible construction of the rule and this rule was one with which both parties were familiar. Nor is there anything in the exceptions to the rule quoted above which operated against the construction the parties themselves put upon it. This exception merely states that insurance in one sum may be granted upon merchandise in one of the classes of buildings mentioned and upon the platforms or cars alongside of said building, without infringing upon the rule. For this specific class of property, the rule merely makes the building and its platform and cars one risk. The language could not be clearer. A transposition of a word which caused the trial court to adopt the conclusion was as follows: The rule prohibits a blanket policy covering under one sum separate or distinct risks or items of hazard. The Court in construing the rule says, "Physically, the vinegar was not necessarily made up of distinct lots or items." That might well be true, but the rule prohibits a coverage under one sum, separate or distinct risks and not lots. The risk, as the parties knew, was not in the vinegar, but in its location. To follow the trial court's reasoning to its logical conclusion, plaintiff might well have had another building situated several miles away and yet, if in his process of manufacture, he transferred the vinegar from one building to another, the insurance would

still follow and cover it, notwithstanding the fact that the policy limited the insurance to cover only while contained in the specific place.

Plaintiff invoked and the trial court seemed to find some materiality in the following rules found in defendants' exhibit 18, Book of Tariffs and General Instructions:

**"No. 3. BRICK AND FRAME
BUILDINGS.**

"When insuring a B or C class building, which has a frame addition (below the roof) specify a separate amount on such addition and its contents; charging on the B or C class portion and contents, the proper B or C class rate. Such frame addition (when occupied by the same person or firm) need not be considered as an exposure to the main building according to the 'Tables of Exposures.' Unless such specifications are made, charge the D class rate on the whole risk.

**"No. 5. FRAME BUILDINGS WITH
COMPARTMENTS.**

"Each compartment for occupancy on the ground floor, of a D class building having more than one such compartment shall be rated as a separate building, if provided with a separate entrance from the street. A D class building, however, having two or more such ground floor compartments, may be insured in a single sum, at the rate of the highest rated compartment of such building. This highest rate shall also be the rate for all the contents contained in two or more compartments of the building above the ground floor, when such contents are in-

sured in a single sum. A lumber, wood or coal yard shall be classed as a D class building, and all the rules applying to a D class building apply also to a lumber, wood or coal yard."

As explained by the expert who introduced this exhibit 18, the portion wherein these rules were found was a book of general estimates, basis rates for the use of agents in the field, so that they could write a risk pending the authorization of a specific rate by the Board, but as admitted by Mr. Veatch and uncontroverted, when a rate had been published by the Board, no agent could make his own rate or adopt any other. (Tr. 129.) However, these rules, even without this testimony, have no materiality. A reading of the rules will demonstrate this. Rule 3 not only does not authorize a blanket coverage, but on the contrary, calls for a specification of a separate amount on the main building and on the addition and its contents. Rule 5 provides for the rating of compartment buildings, D class, of which class the Leo buildings did not belong. The buildings in the instant case were already rated and their class fixed. The utmost immateriality of these two rules in considering the present case, is again demonstrated when it is called to mind that these contracts did not undertake to insure under the blanket coverage, but on the contrary insured the vinegar while contained as described therein, to-wit, in 244 and not elsewhere.

To sum up the entire case, it can be said that the uncontroverted evidence shows that the two buildings denominated respectively 244 and 240, were separate locations and distinct risks or subjects of insurance; that both parties in contracting for the insurance had this in mind and that the risk presented and accepted by defendants was the risk designated as 244 on the southeast corner of Main and "C" street, Moscow, Idaho, and the risk that was damaged by fire was the risk known as 240 Main Street and that therefore, the property insured by defendants was not the property destroyed and that there is absolutely no testimony or inference therefrom to warrant any other conclusion.

Respectfully submitted,

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Attorneys for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit

NORWICH UNION FIRE INSURANCE SOCIETY, LIMITED, of Norwich and London, England, a Corporation,

Plaintiff in Error,

vs.

LEO BROTHERS COMPANY, a Corporation,
Defendant in Error,

and

THE NEW BRUNSWICK FIRE INSURANCE COMPANY, a Corporation,

Plaintiff in Error,

vs.

LEO BROTHERS COMPANY, a Corporation,
Defendant in Error.

Upon Writs of Error to the United States District Court of the District of Idaho, Central Division.

BRIEF OF DEFENDANT IN ERROR.

FRANK L. MOORE,
Moscow, Idaho,
Attorney for Defendant in Error.

FILED

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U. S. DISTRICT COURT

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Circuit Court of Appeals
For the Ninth Circuit

NORWICH UNION FIRE INSURANCE SO-
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Plaintiff in Error,

vs.

LEO BROTHERS COMPANY, a Corporation,
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THE NEW BRUNSWICK FIRE INSURANCE
COMPANY, a Corporation,

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Defendant in Error.

*Upon Writs of Error to the United States District
Court of the District of Idaho,
Central Division.*

BRIEF OF DEFENDANT IN ERROR.

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STATEMENT OF THE CASE.

This appeal includes two actions brought by the defendant in error against the plaintiffs in error to recover upon insurance policies issued by the plaintiffs in error indemnifying the defendant in error against loss of certain property by fire.

In the lower court, the defendant in error was plaintiff and plaintiffs in error were defendants, and we will thus refer to the parties in this statement.

The actions were commenced in the District Court of the Second Judicial District of the State of Idaho, in and for Latah County and were removed to the District Court of the United States for the District of Idaho, Central Division, and by stipulation the two cases were consolidated for trial in the lower court, and for the purpose of appeal to this court. (Trans. of the Record, page 26.)

The complaints are in the usual form; that against the defendant, Norwich Union Fire Insurance Society, Limited, is found in the transcript of record at pages 1 to 21 inclusive, and that against the defendant, The New Brunswick Fire Insurance Company, a corporation in the transcript at pages 181 to 203 inclusive.

By stipulation found in the record at pages 26 to 28 inclusive, the answers of the defendants and certain exhibits and testimony deemed immaterial on this appeal, are omitted from the record.

When called for trial in the lower court, a written stipulation was entered into in each cause, that the issues of fact be tried and determined by the court without the intervention of a jury. (Trans. pages 22 and 204.)

The causes were tried and submitted on the 19th day of May, A. D. 1922, and on the 18th day of August, 1922, his Hon. Frank S. Dietrich, Judge in the lower court, made and filed his opinion, found in the transcript at pages 144 to 158 inclusive, directing judgment in each case for the plaintiff.

On the 31st day of August, 1922, the defendants jointly filed a "Motion to Suspend Entry of Judgment and for Re-Hearing," which is found in the transcript at page 158.

Thereafter, and on September 19, 1922, his Honor, Judge Dietrich, made and entered a "Memorandum Upon Defendants' Motion for Re-Hearing," found in the transcript at pages 160 to 163 inclusive, and thereafter and on the 19th day of September, 1922, made and entered judgment in each cause; that against the defendant, Norwich Union Fire Insurance Society, Limited, a corporation, is found in the transcript at pages 163 and 164 inclusive, and that against the defendant, The New Brunswick Fire Insurance Company, a corporation, is found in the transcript at pages 204 and 205.

Thereafter defendants served and filed a petition for new trial in each case; that of the Norwich

Union Fire Insurance Society, Limited, is found in the transcript at pages 166 to 169 inclusive; that of the defendant, The New Brunswick Fire Insurance Company, a corporation, is found in the transcript at pages 207 to 210 inclusive.

On the 19th day of June, 1923, the lower court made and entered its order in each case denying a new trial; these orders are found in the transcript at pages 170 and 211. Thereupon the defendants each petitioned for a writ of error to this court and an order allowing the same was given and made in each case on the 18th day of August, 1923; for the petition of the Norwich Union Fire Insurance Society, Limited, and order thereon, see pages 171 to 175 inclusive; for the petition and order in the matter of The New Brunswick Fire Insurance Company, see pages 211 to 216 inclusive. The appeal was perfected and by the stipulation found at page 226 of the transcript, the issues to be considered by this court are reduced to an interpretation of the descriptive clause in each insurance policy involved.

From the admissions made and stipulations entered into and the evidence adduced upon the trial of the causes, the following facts are fairly deducible:

The plaintiff is a corporation organized under the laws of the State of Idaho, with its principal place of business and head office in Moscow, Latah County, Idaho, and has been, and now is, engaged in the

operation of a cider and vinegar plant, and has been, and now is, manufacturing cider and vinegar at Moscow, Idaho.

The defendant, Norwich Union Fire Insurance Society, Limited, is a corporation organized under the laws of England, with its principal place of business and head office in Norwich, England, and has been, and now is, engaged in the general fire insurance business and has been, and now is, authorized to conduct its said business in the United States, and has complied with all the laws of the State of Idaho, regarding foreign corporations and fire insurance companies doing business in the State of Idaho, and has been, and now is, authorized to conduct and carry on its said business within the State of Idaho, and to make and enter into contracts of indemnity against loss by fire, and issue and deliver fire insurance policies in conformity with and agreeable to the laws of the State of Idaho, and the defendant, The New Brunswick Fire Insurance Company is a corporation organized under the laws of New Jersey, with its principal place of business and head office in New Brunswick, New Jersey, and has been, and now is, engaged in the general fire insurance business, and has been, and now is, authorized to conduct said business in the United States, and has complied with all the laws of the State of Idaho, regarding foreign corporations and fire insurance companies doing business in the State of Idaho, and has been, and now is,

authorized to conduct and carry on its said business within the State of Idaho, and to make and enter into contracts of indemnity against loss by fire and issue and deliver fire insurance policies in conformity with and agreeable to the laws of the State of Idaho. (See Paragraph I and II of the complaint found at page 1 of the transcript; Paragraphs I and II of the complaint found at page 181 of the transcript; and "Stipulation Re-Printing of Record" found at pages 226 and 227 of the transcript.)

That at all times in the complaints mentioned, Fred Veatch and M. J. Veatch have been co-partners doing business at Moscow, Latah County, Idaho, under the name and style of Veatch Realty Co., and that said co-partnership has been engaged in the business of writing fire insurance. (See testimony of Fred Veatch, transcript, page 30.) Veatch Realty Co. has been agent of the defendants for the writing of fire insurance policies for a number of years. (See testimony of Fred Veatch, Trans. pages 30 to 31 inclusive.)

The vinegar plant of Leo Bros. Company, a corporation, is situated in Moscow, Idaho, on the east side of Main Street between "A" and "C" Streets, on the southeast corner of the intersection of "C" and Main Streets, and the company has been operating a vinegar factory at this location since 1913, and was the owner of the premises on the 21st day

of December, 1920, and had been the owner of the premises at all times up to the trial of the cases in the lower court. (See testimony of Fred Veatch, Trans. page 31.)

On the 21st day of December, 1920, the Veatch Realty Co. issued a policy of insurance in the name of the defendant, Norwich Union Fire Insurance Society, Limited, of Norwich and London, upon property of the plaintiff, Leo Brothers Company, and on the 28th day of July, 1920, the co-partnership of Veatch Realty Co. wrote an insurance policy upon property of Leo Brothers Company, for the defendant, The New Brunswick Fire Insurance Company (see testimony of Fred Veatch, Trans. pages 31 to 33 inclusive and the policies, Exhibits "A," one found at page 6 of the transcript and one found at page 187 of the transcript), and the plaintiff paid the premium on these policies (see Paragraph VII of each complaint and stipulation found at page 34 of the transcript).

The descriptive clauses of these policies relating to the property covered and its location are not materially different. They were prepared in triplicate upon printed blank riders furnished by the defendants and when filled out the original was pasted on the face of the policy, a copy was pasted to the daily report that went to the office of the Company and the third was retained by the issuing agent. (Trans. pages 48 to 50 inclusive.)

The Norwich Union clause, briefly, is as follows:

“On the following described property, all situate at No. 244 on the east side of Maine Street, between “A” and “C” Streets in Moscow, Idaho.

1. \$5,000.00. On merchandise of every description, consisting principally of cider vinegar manufactured or in process of manufacture, and all materials for manufacturing same * * * all only while contained in the three story comp. roof brick & one story frame building, and its additions (if any) of like construction communicating and in contact therewith, situate No. 244 on the Southeast corner of Main & “C” Streets in Moscow, Idaho.”

At the bottom of the policy after the date line, and above and to the left of the signature of the issuing agent, are notations under the printed headings:

“Insurance Map”
 “Sheet . . . ”
 “Block . . . ”
 “No. . . . ”

so that the same reads as follows:

“Insurance Map”
 “Sheet 4”
 “Block 102”
 “No. 244.”

(See Exhibit “A”, pages 7 to 9 inclusive of the transcript.)

The descriptive clause in the policy of the de-

fendant, The New Brunswick Fire Insurance Company, is as follows:

“On the following described property, all situate No. 244 on the south-east corner of Main and “C” Streets in Moscow, Idaho.

\$6,000.00. On merchandise of every description consisting principally of cider vinegar manufactured or in process of manufacture and on material for manufacturing same, etc.
* * * all only while contained in the three story comp. roof brick & one story frame building, and its additions (if any) of like construction, communicating and in contact therewith, situate as above.”

At the bottom of this policy, and after the date line and to the left of the signature of the insurance agent, are the following notations under the printed headings:

“Insurance Map,
Sheet 4,
Block 102,
No. 244.”

(See Exhibit “A”, Trans. pages 187 to 190 inclusive.)

The descriptive clause in each of these policies as they relate to the location of the property insured were written with reference to the insurance map referred to in each of the policies. (Testimony of Fred Veatch, Trans. pages 37 and 38.)

This map referred to and identified as Sanborn’s Fire Insurance Map of the City of Moscow, in force

at the time these policies were written, was admitted in evidence and marked Plaintiff's Exhibit No. 3. (See Trans. page 38.) Page 4 of the same, whereon the plant of the vinegar factory of the plaintiff is shown was also identified and admitted in evidence as plaintiff's Exhibit 3-A. (See Trans. page 38.) A copy of plaintiff's Exhibit 3-A is also found at page 229 of the transcript.

A fire occurred upon the property of the plaintiff on the 6th day of July, 1921. (Testimony of Fred Veatch, Trans. page 34.) The fire started on the property located at No. 224, according to the Sanborn Fire Map, in an old barn, which did not belong to Leo Brothers Company, and which was being used by a Highway District. This fire communicated from the barn to the property of Leo Brothers, and the damage was done to vinegar contained in tanks in that part of the building owned by Leo Brothers Company and marked "Vinegar Tanks" on plaintiff's Exhibit 3-A, found at page 229 of the transcript. (Pages 39 and 40 of the transcript.) The loss was approximately 130,000 gallons of vinegar and there was \$31,000.00 insurance thereon, including the amounts of the policies in controversy. (Trans. page 40.)

Notice of the fire and proofs of loss upon the policies before the court, were made according to the conditions contained in the policies (Trans. page 42). No part or portion of the loss under

either of the policies has been paid. (Trans. page 43.)

Fred Veatch was the principal stockholder and manager of the plaintiff but the officers of the defendants knew this and do not contend for any non-liability on the ground that Mr. Veatch, when the policies were written, owned an interest in the property insured. (See Trans. page 95.)

The entire structure designated on the insurance map, plaintiff's Exhibit 3-A, as "Vinegar and Cider Factory" and "Vinegar Tanks" and "Vinegar Storage" are all used together in the manufacture of vinegar and cider. (See the testimony of Fred Veatch, Trans. pages 92 and 93), where the witness explains the process of manufacturing cider vinegar and shows the connection of the various parts of this building by a common use in the manufacture of vinegar products. These parts are also physically connected. (See Trans. page 92, testimony of Joseph M. Kimberling, Trans. pages 116 to 120 inclusive, and plaintiff's Exhibit 3-A, Trans. page 229.)

The Board of Underwriters of Insurance have prescribed specific rates upon all insurable property in this Block 102 (see defendant's Exhibit No. 7, Trans. page 231). In this exhibit by line numbered 2, under the heading "No. of Rating," the specific rate for the vinegar factory of the plaintiff is \$2.50 per hundred on building and contents.

There is an error in this exhibit as printed in the record. The first \$2.50, after the words "Vinegar Factory" in line 2, should be under the heading "Bldg." for building, and the second \$2.50 should be under the heading "Contents" instead of Cents. In other words, the building and the contents of the building take the same rate of insurance. (See Trans. page 150 for correct copy.) The third line of this exhibit designates the specific rate on the part of the building marked "Vinegar Tanks" on plaintiff's Exhibit 3-A, and contents of the same at \$2.45 per hundred (Transcript of Record, page 53).

The witness Veatch for some time, in writing insurance at the reduced rate on the vinegar tanks and contents, had used "No. 240" to designate the location of the insurance. This number was used for his own convenience in cancelling policies upon contents of the vinegar tanks, as the vinegar was sold and shipped out. (See Trans. pages 99 and 100.) There is no number 240 on the insurance map, nor in the rating book.

The plant of the plaintiff, as an insurance risk is known as a special hazard among the insurance people, because it is a manufacturing plant, and when reports covering a special hazard are sent into the companies, the matter is immediately referred to special agents who make inspection of the property insured, both as to its physical and moral hazard. (Testimony of Witness Veatch, pages 100,

110 and 111.)

When insurance was written upon this plant and reported at the rate of \$2.50 per hundred, the insurance company receiving the report would know that the insurance covered the entire plant, and when the rate of \$2.45 per hundred was reported, the company or the officers thereof having the matter in charge would know that the insurance related to that part of plaintiff's plant specified on the insurance map as "Vinegar Tanks," by a reference to the rate book. (Trans. page 109, 111, 112.)

The specific rates at Moscow, contained in the book of specific rates, of which defendant's Exhibit 7 (Trans. page 231), is page 3, are subject to the rules as provided for in the book of Tariff Rates and Rules. (Defendant's Exhibit 18.) (Testimony of John K. Wooley, Trans. page 130.)

In order to write insurance on two or more buildings, which may be specifically rated, it is necessary to adopt either the average or distribution clause or the ninety or one hundred per cent reduced rate average clause, as provided by the rules on page 12 of Tariff Rules, found in defendant's Exhibit 18, or by writing the policy at the highest rate applicable under Rule 4, found at page 4 of Tariff Rules, in defendant's Exhibit 18.

POINTS AND AUTHORITIES.

I.

The record raises no questions open to review by

this court, and the judgment of the lower court should be affirmed.

Revised Statutes, Secs. 649 and 700.

Section 291 of the Judicial Code.

British Queen Mining Co. of Colorado vs. Baker Silver Mining Co., 139 U. S. 222; 11 Sup. Ct. Rep. 523.

Grayson vs. Lynch, 163 U. S. 472; 16 Sup. Ct. Rep. 1064.

City of St. Louis vs. Western Union Tel. Co., 166 U. S. 388; 17 Sup. Ct. Rep. 608.

Chicago G. W. Ry. Co. vs. Minneapolis St. P. & S. S. M. Ry. Co., 176 Fed. 237.

First Nat'l Bank of Bayonne vs. Anglo-South Amer. Bank, 230 Fed. 817.

Bundy vs. Huntington, 224 Fed. 847.

Ladd, Etc., Bank vs. Lewis A. Hicks Co., 218 Fed. 310.

Phoenix Securities Co. vs. Dittmar, 224 Fed. 892.

II.

A policy of insurance should be construed according to the plain, ordinary and usual meaning of the language used to carry out the intention of the parties as gathered therefrom.

Arkansas Ins. Co. vs. McManus, 110 S. W. 797, Ark.

Palatine Ins. Co. vs. O'Brien, 68 Atl. 484, Md.

French vs. Fidelity & Casualty Co., 115 N. W. 869, Wis.

Wisconsin Zinc Co. vs. Fidelity & Deposit Co., 155 N. W. 1081, Wis.

III.

Fire insurance policies, as other contracts, should be reasonably interpreted in accord with the apparent object and intent of the parties.

German-American Ins. Co. vs. Messenger, 136 Pac. 478, Colo.

Hocking vs. British-American Assur. Co., 113 Pac. 259, Wash.

IV.

A policy, like other contracts, must be construed from the language used, and when the terms are plain and unambiguous, the court should hold the parties thereto.

Laventhal vs. Fidelity & Casualty Co., 93 Pac. 1075, Cal.

Puget Sound Imp. Co. vs. Frankfort Marine Accident & Plate Glass Ins. Co., 100 Pac. 190, Wash.

V.

Policies of insurance, like other written contracts, will be construed with a view of carrying out the intention of the parties.

Jennings vs. Brotherhood Acc. Co., 96, Pac. 982, Colo.

Cutting vs. Atlas Mut. Ins. Co., 85 N. E. 174, Mass.

VI.

Where there is no doubt as to the meaning of a

contract there is no room for construction.

E. H. Stanton Co. et al, vs. Rochester German Underwriter's Agency, 206 Fed. Rep. 978.

Dover Glass Works Co. vs. American Fire Ins. Co., 29 Atl. 1039.

Hurt vs. Monumental Mercury Mining Co., 35 Idaho, 295.

Lathers vs. Mutual Fire Ins. Co., 116 N. W. 1.

VII.

Where the subject of insurance is described as a building, the entire structure composed of several parts, is included, if the parts are so joined as to be used as one, and devoted to the same common purpose.

Pettit vs. State Ins. Co., 43 N. W. 378, Minn.

Gross vs. Milwaukee Mechanics Ins. Co., 66 N. W. 712, Wis.

Still vs. Connecticut Fire Ins. Co., 172 S. W. 625, Mo.

Henry Clay Fire Ins. Co. vs. Crider, 229 S. W. 128, Ky.

Prussian Nat. Ins. Co. vs. Terrell, 135 S. W. 416, Ky.

Violette vs. Queen Ins. Co., 165 Pac. 65, Wash.

VIII.

Error in rates does not effect contractual rights arising out of insurance policies.

National U. S. Fire Ins. Co., et al, vs. John

Spry Lumber Company, 85, N. E. 256, Ill.

IX.

The doctrine that an insurer may waive its right to insist that the rights of the insured have been forfeited extends to practically every ground for denying liability.

Knickerbocker Life Ins. Co. vs. Norton, 96 U. S. 234.

Dover Glass Works Co. vs. American Fire Ins. Co., 29 Atl. 1039, Del.

X.

Inferences may arise only from facts established by evidence and can never be made to subserve the primary functions of evidence.

Swetland vs. New World Life Ins. Co., 35, Idaho, 109.

Beazley vs. McEver, 238 S. W. 949, Tex.

ARGUMENT.

The opinion of his Honor, Judge Dietrich, which is found in the Transcript of Record, beginning on page 144 and ending on page 158 and his "Memorandum Upon Defendants' Motion for Re-Hearing," beginning on page 160 of the transcript, disclose such a fair, complete and comprehensive consideration in the trial Court, of the contentions of the appellants in error, that an argument upon our part seems a work of supererogation.

We will therefore limit our discussion to issues arising since the trial of the causes and to those issues of fact not discussed by Judge Dietrich.

Our first contention is, that the record of these causes, presents no questions to this court, which are open to review.

Section 649 of the Revised Statutes provides that issues of fact in civil cases in the Circuit Courts of the United States may be tried and determined by the Court without the intervention of a jury, by the parties filing with the Clerk a stipulation in writing, waiving a jury. The finding of the court upon the facts which may be either general or special shall have the same effect as the verdict of a jury.

Section 700 is as follows:

“When an issue of fact in any civil cause in a Circuit Court is tried and determined by the court, without the intervention of a jury, according to Section Six Hundred Forty-Nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a Bill of Exceptions, may be reviewed by the Supreme Court upon a Writ of Error or upon appeal, and when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the Judgment.”

The foregoing provisions of the Revised Statutes are retained and made applicable to Law actions tried in the District Courts by Section 291 of the

Judicial Code, which provides in substance, that wherever in any law not embraced within the act, any reference is made to, or any power or duty is conferred or imposed upon the Circuit Courts, such reference shall upon the taking effect of the act be deemed and held to refer to and to confer such power and impose such duty upon the District Courts.

It follows then that only when the findings of the court are special may the review of the appellate court extend to a determination of the sufficiency of the facts found to support the judgment, and if the finding is general, then the sufficiency of the evidence will not be considered for the purpose of disturbing or reviewing the judgment.

In each case at bar the finding is general. There are no special findings, nor did the plaintiffs in error, or either of them, ever at any time present to the court for consideration, special findings upon any issues of fact involved. The nearest either came to presenting special findings is shown at page 141 of the transcript of the record from which we quote:

“MR. DAVIS: The defendant rests, Your Honor. I am not quite familiar with the practice where the case is tried without a jury, but the defendant asks the court to make findings in favor of the defendant, special findings, finding facts in favor of the defendant, and asks leave to present proposed findings.”

But at no time thereafter did the defendants request or suggest findings, either in their briefs or petition for re-hearing or otherwise, nor did they ever present a desired or proposed finding upon any point or issue, or remind the court of the foregoing suggestion made in the course of the trial. Neither does the record contain any exceptions to the rulings of the court made in the progress of the trial of the causes. It is true that the appellants in error each petitioned for a new trial and that the court denied such petition, but no exception was taken to such ruling.

In the case of *British Queen Mining Co. of Colorado vs. Baker Silver Mining Co.*, 139 U. S. 222, this question was fairly before the Supreme Court of the United States upon a record on all fours with the record in the cases at bar, and the Court speaking through Fuller, C. J., lays down the rule as follows:

Where the record contains a Bill of Exceptions, but no exceptions to the rulings of the Court, in the progress of the trial of the cause, were thereby duly presented and, although after reciting the evidence, it is therein stated that "The court thereafter and during the said term made the following Findings of Fact and Judgment thereon," which is followed by an opinion of the Court assigning reasons for its conclusions, this cannot be treated as a special finding, enabling the Court to determine whether the facts found support the Judgment nor

can this general findings be disregarded. In such case the record raises no questions open to revision by the Supreme Court.

We, therefore, most respectfully submit that no error upon the part of the trial court is saved for consideration by this court.

An examination of the specifications of error assigned by plaintiffs in error, as found in the transcript at page 172 to 174 inclusive and 212 to 215 inclusive, and pages 13 to 15 inclusive of their brief, suggests to us that counsel for plaintiffs in error are undertaking to treat the decision of the lower court as special findings. They should not be permitted to do this, because it has never been held in the Federal Courts that an opinion of the trial judge, setting forth the reasons for his decision in an action at law tried by a Federal Court without the intervention of a jury can be regarded as special findings within the meaning of the statute and where following such opinion, judgment is ordered for plaintiff, as in the case at bar, the finding is always considered general.

Assignment No. II was waived, as disclosed by the record at page 122, where counsel for plaintiffs in error says:

“MR. DAVIS: The plaintiff having rested, your Honor, the defendant moves the court to enter judgment for the defendant upon plaintiff's own case, that he is not entitled to recover. There are matters which I wish to argue in brief.

THE COURT: I think I will not entertain argument unless you are willing to stand upon the motion.

MR. DAVIS: All I have is just an expert here; he just stepped out in the hall; if we can wait a few minutes Mr. Webster might take the stand and give us his testimony as to—

THE COURT: Do you want your motion disposed of now?

MR. DAVIS: No, the court did not want to hear argument."

Therefore, at the request of plaintiffs in error, there was no ruling by the court upon their motion for a non-suit.

The Third Assignment of Error is:

"In denying defendants' motion for judgment at the close of the entire case."

The only record upon which this assignment can be predicated is found at page 141 of the transcript and is as follows:

"MR. DAVIS: The defendant rests, your Honor. I am not quite familiar with the practice where the case is tried without a jury, but the defendant asks the court to make findings in favor of the defendant, special findings, finding facts in favor of the defendant, and asks leave to present proposed findings."

This never was considered by any party connected with the trial of the cause as a motion for judgment at the close of plaintiff's case, and the very most that can be claimed for the proceeding is

that it was a request to be permitted to present to the court proposed findings and as the record shows at the same page that no proposed findings were ever presented, nor was any further suggestion made to the court that the plaintiffs in error desired special findings upon any issue of fact involved, we are at a loss to understand why plaintiffs in error undertake to predicate any rights in this court upon this assignment of error.

The same may be said of Assignment of Error No. IV. The request of counsel at the close of the entire case we have quoted above, but the record continues:

“But at no time thereafter did the defendants request or suggest findings, either in their briefs or petition for re-hearing, or otherwise, nor did they ever present a desired or proposed finding upon any point or issue, or remind the court of the foregoing suggestion made in the course of the trial.”

Certainly, no refusal of the court to make special findings upon any issue of fact involved is shown by this record.

Assignment No. V is equally without merit, because each judgment for the defendant in error was entered upon a general finding upon conflicting testimony.

The same is true of Assignments No. VI, VII, VIII, IX, and X.

There being then, no Bill of Exceptions to the

rulings of the court made during the trial of the causes; there being no special findings of the trial court, and no showing that any request for special findings was made to and refused by the trial court, upon which error can be predicated, it is thought that the only authoritative action for this court is an affirmance of the judgment of the trial court.

Counsel in their argument, beginning on page 15 of their brief and ending in the last paragraph thereof, persistently stress the Number 240, as pertaining to a description of that part of the premises involved, designated on the insurance map as "Vinegar Tanks." This is misleading and there is no justification for it.

There is not a scintilla of evidence to show that this No. 240 was ever at any time known to or considered by the insurance companies for any purpose, or by any person or agent connected with the companies, other than the witness Fred Veatch, who fully explains the use of this number, at page 99 of the transcript where he says, in answer to questions by the court:

(Questions by the court.)

"Q. How does it happen that you fixed this No. 240?

A. If I can have that old map, I can explain it to you, that 1909, I think it is. Now as I say when we started in we put up a small shed building, and we had, I think—we put up a small shed on the south side of our ground and put in three tanks only; that shed was

boarded up on this side and on this side.

Q. Yes, I understand that; you testified to that in substance before. I mean how did you happen to hit upon this No. 240?

A. I figured out the way the city numbered it, about the distance between this number and that number and I put on there for my own convenience No. 240, and inadvertently on one policy, which was renewed, which was written I think first in 1913 or 1914 that was renewed every year just the same, I used that 240 on my specific insurance and have done it right straight along, covering the juice, for my own information. When the stock begins to run down I begin to cancel out my specific insurance, as it leaves this tank for the last time, as it is shipped, and I used that 240 merely to keep from looking through my records to show just the specific insurance that I wanted to cancel out."

This No. 240 was not upon the Sanborn map for any purpose whatever, neither was it in the Book of Specific Rates, as they pertain to the manufacturing plant of the defendant in error.

An examination of pages 99 to 104 of the transcript discloses that Judge Dietrich during the trial was at a loss to understand how the insurance companies would know that insurance written upon the property of Leo Brothers Company would cover the entire plant or would be limited to the "vinegar tanks" alone, and this is explained by Veatch at page 109 of the transcript where he was asked the question:

“Q. Assuming, Mr. Veatch, that you write a blanket policy with an insurance company on vinegar contained in the buildings of the plant, at a rate of 2.50; you also write a policy for specific insurance upon vinegar in the tank sheds at the reduced rate of 2.45; you make your report to the company covering the same property as described by the Sanborn Fire Map, and in that report you show the rates for the blanket insurance or the rate rather for the blanket insurance and the rate for the specific insurance, how would the company know what property it was insuring under its separate contracts of insurance.

A. The rate book would indicate that.”

We respectfully submit, that if, as he testified, his reports to the companies showed the descriptive clause of the policy and also showed the rate of insurance, the company or the proper officers of the company could readily understand that the higher rate of \$2.50 per hundred carried insurance upon vinegar in any part of the plant, wherever it might be located, and that the policies carrying the lower or \$2.45 rate, would cover vinegar or vinegar products only when or while located in the “vinegar tanks” in the tank shed.

With the rule of law quoted by counsel in their brief, at the bottom of page 17, we have no contention whatever, but the witness Veatch tells us, as we have shown above, how the plaintiffs in error could have known that the property insured by these two policies was covered in any part of Leo Brothers Company manufacturing plant, and there

is not a scintilla of evidence to show but that the representatives of the company so understood the provisions of the policy.

The witness Veatch further testified and it is undisputed, that in every instance of writing a policy upon this plant, because it was a special hazard under the insurance rules, special agents were sent by the companies whose policies had been reported as covering the plant, to make a full investigation and examination of the property, as to its moral and physical hazard. If these special agents of the plaintiffs in error did this, and Veatch says they did, and there is no evidence showing that they did not, then they came to Moscow, saw the physical connection of the several parts of this plant, saw and understood that it was a manufacturing plant, saw and understood that the parts designated upon the insurance map as "Vinegar Tanks" were used in connection with the other parts of the plant in the manufacture of cider and cider vinegar. If this be true, and there is not a scintilla of evidence to dispute it, then the contention of plaintiffs in error, as exhibited in their brief, is nothing but a mere quibble.

With the authorities cited by counsel for plaintiffs in error on pages 18, 19 and 20 of their brief, we have not the least contention or criticism. Each case which we have read only recognizes the rule that where property is insured in a specific location, *and not elsewhere*, and during the time that the

policy of insurance is in force, such property is removed from the location where it is insured to some other location and is there destroyed, the insurer is not liable.

This principle of law is not involved in the instant cases, because there is no issue that the vinegar was insured in one place and removed to another. The evidence is that in the course of its being manufactured, the vinegar and vinegar products went from one compartment or room of this manufacturing plant to other rooms or compartments of the same, and that the entire plant was all one building by physical connection and by use for a common purpose, and there is not a scintilla of evidence to the contrary.

On page 20 of their brief, counsel say:

“This slight physical connection of the two buildings could hardly constitute the smaller an addition. However, this point is not material for regardless of the physical features, the undisputed evidence by plaintiffs own admissions is, that the parties agreed and considered these two structures as separate locations or risks and regarded them as distinct and separate buildings or subjects of insurance.”

This statement is absolutely without any foundation of fact or inference from any testimony in the record. The entire record shows that for years and years Leo Brothers Company, through Spottswood & Veatch, and through the Veatch Realty Company, has been obtaining insurance upon this vinegar

plant with the intention and thought that specific insurance was the only way to write insurance thereon,

At the bottom of page 89 the following proceedings were had:

“MR. DAVIS: Q. Now when there is a rate, a specific rate fixed by the Board of Fire Underwriters, which is communicated to you, that is the rate that you must use, is that not correct?

A. Yes, sir.

Q. And that rate applies to the entire risk, does it not?

A. Yes, sir, it is supposed to apply to that entire risk.

Q. And when a rate is fixed, identifying a risk, that identifies the specific risk, does it not?

A. It is supposed to, yes.

Q. Now then, explain how, where you have two rates or two separate risks. you can write the two different risks under one coverage, at one separate rate.

A. That rate sheet there that you have in your hand, Mr. Davis, of course, says next south Vinegar tanks. Our heavy values nine or ten months out of the year are in those tanks, and that part of the time I carried a certain amount of specific insurance under the \$2.45 rate. It is impossible for us to carry an average clause down there, because that vinegar is shifting practically every day from one building to the other. one part of the building to the other. There is no means of bookkeep-

ing that we could put in down there that we could keep track of the vinegar that would be in part of that building one night and what was there the next night, without making the actual inventory and measurement, and we have always carried a certain amount of specific insurance on those, and as the stock went down, we would cancel out on that stuff.

MR. MOORE: Under the two forty-five rate?

A. Under the two forty-five rate, yes, sir.

MR. DAVIS: Then the insurance that was written which describes 240 was specific on the vinegar tank shed, is that correct?

A. On the contents of the vinegar tanks, yes, sir.

Q. Now again referring to the word "south" that you speak of. On this rate manual, south, first, southeast corner of Main and "C" Streets, 244?

A. Yes, sir.

Q. Then there is "South"?

A. Yes, sir, no number.

Q. Then there is another south 244 (this should be 224—See Defendants' Exhibit 7, trans., page 231).

A. Yes, sir.

Q. Is it not a fact that that rate schedule refers to separate risks, each one separate?

A. I don't understand it so, no, sir.

Q. You did understand it so, though, when you applied took the two forty-five rate for one and a two fifty rate for another, did you not?

A. No, sir, I did not. I understood that I

could write specific insurance at that rate on that, and then write blanket insurance to cover the—

Q. Does this rate manual tell you what to do in regard to it?

A. I wouldn't be positive, I wouldn't say until I can read it and refresh my memory on it.

Q. Isn't it a fact that if you are using a general coverage that you must average your rate?

A. I don't understand so.

Q. Or apply for a specific rate for the entire building from the Board of Fire Underwriters?

A. I don't understand so, no.

Q. Then Mr. Veatch, let me read this from your testimony in the former trial: I said: 'And where there is a fixed rate for a certain risk that applies to the entire risk?' 'I think that is correct, I think there are some exceptions to that rate.' 'You are referring to the average clause, but you have never used the average clause in writing this particular kind of a risk?' 'No, sir.' 'The average clause has no bearing on this particular kind of case?' 'No, sir.' 'You identify to your principal the particular insurance you desire or that you are binding them with, as a single particular risk in all cases? In other words, you never write two separate risks at separate rates in one policy?' 'No, sir.' 'That cannot be done, according to your rules or the rules of your principals?' 'I don't think so. I have never done it anyhow, or attempted to do it.' That was your testimony in the former trial, was it not?

A. Yes, sir, and that is still correct.

Q. That was your belief at that time and that is your belief now?

A. It is my belief now, yes, sir."

Now we respectfully submit that, considering all of this testimony, and it is undenied, and was brought out on cross examination, the only reasonable conclusion is that it was the intention of the witness Veatch to write specific insurance upon vinegar contained in any part of the manufacturing plant of the defendant in error. He wrote it at only one rate; he wrote it as only upon one risk. It cannot be argued for a single moment that the policies in controversy cover two risks at two separate rates. The risks covered by the policies are vinegar and vinegar stock situated anywhere within the manufacturing plant of Leo Brothers Company. It is not specific insurance on vinegar in the "vinegar tanks" at the reduced rates.

In the testimony of the witness Veatch, quoted at pages 23 and 24 of the brief of plaintiffs in error, nothing can be deduced except that the witness, Veatch, wrote policies at times on the entire manufacturing plant and contents at the 2.50 rate, and at other times he wrote policies on the vinegar tanks and the contents thereof, as a separate risk at the rate of 2.45. He testified that he knew that he had no authority to change rates and admits that when he wrote this latter class of insurance, that is, on the contents of the "vinegar tanks" at the 2.45 rate,

he described the rate as line 3, page 3 of the Book of Specific Rates for Moscow, and the conclusions drawn by counsel in their brief from this testimony are not justified. They say:

“It showed that he knew and understood 240 (this is the vinegar tanks and the vinegar tank shed) to be a separate subject of insurance from 244.”

and this is true. If Leo Brothers Company desired specific insurance at the reduced rate or at the 2.45 rate, that insurance was limited to the tank shed and the tanks therein and the contents thereof. There can be no quibble about this, and if Leo Brothers Company so desired they could insure the buildings of the entire plant, the machinery of the entire plant and the contents of the building or buildings, as we may choose to call it, of the entire plant, as one risk or one hazard, at the rate of 2.50.

We fail to understand how counsel get any consolation from the case of Stanton et al. vs. Rochester German Underwriters Agency, 206 Fed. 978. They say:

“In that case there was but one entire building, broken up into several compartments. The policy provided that the insurance should attach to each of these buildings and contents in certain proportions. The contention was made that inasmuch as there was but one building, this clause could not be applied.”

Then quote from the opinion of Judge Rudkin

who tried the cause in the lower court, and we respectfully insist that if, by the contract of insurance one building is broken up or divided into several compartments for purposes of insurance, then the contract must prevail and the converse is equally true. If the several parts of one building may be insured at different rates, by making specific insurance upon each compartment or its contents, then the parties may agree that the entire building may be insured at one rate or at any rate and may agree that the entire buildings be treated as one risk. This rule of law announced by Judge Rudkin means nothing more or less than this: Parties may agree that the several apartments of one building may be treated as separate hazards and insurance may be written upon the contents thereof as separate risks, or that the parties may agree that insurance may be written upon one building at any particular or specific rate.

In the instant case, the conduct of Veatch in writing these policies of insurance does not mean, nor can the conclusion be drawn, that he undertook to change rates or to increase the liability of the plaintiffs in error in any particular. It shows that he treated the entire plant as one building and assumed that he had the right to insure the contents of any or every part of the building at the highest rate carried by any compartment of the building. It also shows that he believed or assumed that he had the right to write specific in-

insurance at a lower rate on that part of the building designated as "Vinegar Tanks" or the vinegar tanks therein, and all vinegar or vinegar products therein contained.

We contend, and are undertaking to show that the rule approved by Judge Rudkin is that insurance is a mere matter of contract and that parties to such contracts bind themselves according to the plain, unambiguous provision thereof. We are not contending, nor have we ever contended, that the provisions of the contract in the Stanton case are identical with the terms of the contracts at bar, but that the rule announced there applies to the cases before the court.

If the conditions contended for by plaintiffs in error existed at this vinegar plant of Leo Brothers Company, it would have been the next thing to impossible for Leo Brothers Company to have had insurance written upon their vinegar or vinegar products so that they could have had protection thereon, because if the vinegar should have been insured in that part of the building designated as "Vinegar Tanks" and then in the process of being manufactured, it was removed to the north part of the building, while there it would have been uninsured. On the other hand, had they insured vinegar in the north part of the building and it had been removed to the vinegar tanks, and there was a loss there, the company would have had no insur-

ance, and the only way it could carry insurance and protect itself would have been to write insurance upon vinegar while situated in any part of the plant and to do this it must write at the highest rate of insurance fixed on the entire plant and contents, or the 2.50. But when the process of manufacturing was completed, and it became nothing but a matter of storage and removal of the vinegar then large quantities of the vinegar, as the witness Veatch put it:

“Our heavy values nine or ten months out of the year are in those tanks.” (Transcript page 90-102-106.)

The companies had given defendant in error a special rate of insurance upon the same while contained in the tanks and Veatch wrote specific insurance under the special rate. (Trans. page 90.)

The understanding and intention of the witness Veatch in writing this insurance is clearly expressed in his testimony, given on cross examination and quoted on page 30 of the brief of plaintiffs in error. Counsel start out with the question:

“You are familiar with the rule for applying co-insurance reduced rate average clause.”

(The contract in the Stanton case embodied the provision for insurance under the co-average clause and applies only as we understand it to two or more separate or distinct insurance risks or hazards.)

The witness answers "Yes", and ends with the question at the bottom of the page:

"Q. That is the only way that they could be covered under one coverage?"

And the witness answers:

"If they were two buildings that would be true, yes."

The only conclusion deducible from this quotation is that Veatch was familiar with the rule for applying the coverage clause, and that in his opinion it applied only where there were two buildings covered by one policy.

These policies before the Court were written at the highest rate applicable to the entire manufacturing plant. No effort is made to obtain the benefit of a reduced rate.

On page 31 of their brief, counsel say:

"And later when his counsel had switched to this position of blanket coverage, he says,

Q. Mr. Veatch you have these rate books which are your only instructions. Will you find in there any place that authorizes the writing of blanket coverage where there are two specific rates given by the rating Bureau?

A. I don't think I could in any limited time; I don't know whether I could at all or not.

Q. You are not familiar with any such rules as authorize that anyway?

A. No, sir."

Counsel then refers to the testimony of one Wooley and refers to page 130 of the transcript. An examination of the transcript at this citation, will disclose that the witness Wooley gave no such testimony. The question asked Wooley was as follows:

“Now referring to the specific rates at Moscow, and your rules as promulgated there, tell me whether or not, where there are two risks specifically and separately rated, such as line 2 and line 3 of this book, whether it is possible, and to conform to the rules of the company, for an agent to write both risks under one coverage at one rate.”

And Mr. Wooley answers:

“In the first place, the book of specific rates states that the specific rates in the book applying to the different risks are subject to the rules as provided for under the other book (the other book is defendants' Exhibit 18). In the other book it states that insurance may be issued only covering a specific amount on building, a specific amount on machinery, tools and fixtures, a specific amount on stock in the building. Other than that, in order to write insurance on two or more buildings which may be specifically rated, it is necessary to adopt either the average distribution clause or the ninety per cent reduced rate average clause, which is accepted for blanket purposes, in lieu of the average distribution clause.

Q. Now in other words the only way that you can write insurance under those conditions is by using the reduced rate average or the co-insurance clause?

A. And the highest rate applicable."

This is just exactly what Veatch did in writing this insurance for the defendant in error. He wrote the policy upon vinegar situated at any place within the building occupied by the plant at the highest rate applicable, \$2.50 per hundred.

The next question and answer are almost farcical:

"Q. You have to use all three of these to make a blanket coverage and if they are not used there could not be a blanket coverage according to the rules?

A. There could not be a blanket coverage."

Now neither the witness Wooley nor counsel will contend that to write a blanket policy, as it is understood in the insurance business, the reduced rate average clause and the co-insurance clause, and the highest rate applicable must be united. The truth of the matter is, that when the witness Wooley answered the following question of counsel as he did:

"Now in other words, the only way that you can write insurance under those conditions is by using the reduced rate average or the co-insurance clause?

A. And the highest rate applicable."

Counsel for plaintiffs in error were astounded, because this is just exactly what the witness Veatch had done in writing the policies involved here. He had intended to cover vinegar and vinegar

stock in any part of the manufacturing plant wherever it might be, and had written the policy at the highest rate applicable.

This rule for writing policies at the highest rate applicable is found at page 4 of the Tariff Rules, contained in defendants' Exhibit 18, and is as follows:

“When two or more buildings (used for any of the purposes described in the list below) adjoining or adjacent, are occupied by the same person or firm for a common purpose, so that the buildings, although separated, virtually constitute a single hazard, they need not be charged for as exposures to each other, provided the highest basis rate of any of the buildings so adjoining or adjacent to each other is made the basis rate for each one of said buildings, according to its class, whether B, C or D; otherwise each building taking its proper basis rate in accordance with the rule for determining rate of premium must be subject to the charge for exposures as per the tables of exposures.”

One of the lists referred to by the explanation above in parenthesis, is as follows:

“Cluster of buildings forming a mill or manufacturing establishment (it being understood that dwellings and barns, even if occupied in connection with such mill or manufacturing establishment must be regarded as exposures thereto).”

This rule is what Wooley referred to in connection with rule No. 20 (A) found at page 12 of

Tariff Rules in defendants' Exhibit 18, which relates to blanket policies.

On page 31 of their brief we are covertly accused of switching our position. The witness Veatch had always considered this insurance as specific insurance. Beginning at the bottom of page 87 he testified as follows:

“Q. And following those instructions, do you know of any way that you could write the two risks under one coverage, and still adhere to the instructions and rates? I believe you testified on the former trial that there is none, did you not?

A. That there was not what?

Q. That you knew of no way, except by the reduced rate average clause?

A. Yes, the reduced rate average.

Q. That is the only way they could be covered under one coverage?

A. If they were two buildings that would be true, yes.

Q. Just as the rate stands, a 2.50 rate on the vinegar factory and a 2.45 on the storage shed, applying those rates, there is no way except by using the reduced average clause and applying the higher rate, there is no way by which you could write them under one coverage?

A. I still don't see why the specific insurance that I wrote on there couldn't be written. I still can't grasp that as well as the blanket coverage.

Q. How did you apply the rates in cover-

ing 244, and the building known as 240, how under one rate and covering them both what rate did you use?

MR. MOORE: Mr. Davis, I would ask you to reform your question; there was no building known as 240.

MR. DAVIS: I will use it in the sense that he used it.

WITNESS: My impression was that the form that we used on those policies, where it says on there 'additions communicating and in contact therewith' covered it."

We never have entertained any other thought than that the insurance in controversy is specific insurance upon vinegar and vinegar stock wherever located in the plant. That this was the intention of the witness Veatch when he wrote these policies in controversy is disclosed beyond any doubt by his cross-examination found in the transcript at pages 86-92 inclusive.

It may be, as ruled by the trial court (Trans. pages 96-97), that we could not have shown this intention of the witness, Veatch, on direct examination but these statements of his intent were brought out by opposing counsel by his cross examination, and as this evidence of his intention is uncontradicted we submit that plaintiffs in error are bound thereby.

An examination of the transcript preceding page 108 will show that the witness Veatch did not understand the purport of certain questions asked

him by the court, which were intended to disclose how the representatives of the insurance companies, from the reports sent in by Veatch Realty Co., as agents, and which contained the description found on the Sanborn Fire Map, could know whether the insurance written was upon the entire plant as a whole or upon the south part of the building.

Observing this, and feeling that the witness Veatch did not understand the scope of the questions asked by the court, we asked him the question found at page 109, and the witness readily answered:

“The rate book would indicate that.”

Now our purpose in using the expression “Blanket Policy” was to call to the attention of the witness a policy that covered vinegar while situated in any part of the plant, and we used the words “Specific Insurance” in that question in the sense of insurance upon vinegar in the “Vinegar Tanks”, and the witness at once understood what we were asking, and answered as to his understanding of the matter.

Then it appeared that his Honor, Judge Dietrich, did not understand our question, and the witness’ answer, and he asked further questions of the witness, beginning on page 111, and at page 112 the witness Veatch says:

“Judge those forms, I don’t know how I

could make it any plainer than they read themselves.”

Then the court asks another question, and the witness replies:

“The form of the policy reads, ‘and its additions, communicating or in contact therewith.’

THE COURT: Isn’t that true also of the 240 policy?

A. Yes, sir, the only way they could get at that would be by reference to *their rate book, that says line 3, Tank Sheds.*”

Witness here refers to the reference in the policies written on vinegar in the “Vinegar Tanks” at the 2.45 rate.

The last paragraph of the brief of the plaintiffs in error is unwarranted, either as a statement of fact or as a conclusion of fact from the evidence adduced upon the trial of the cause.

There is not a scintilla of evidence to show that any person at any time connected with these transactions of insurance, evidenced by the two policies before the court, ever considered the premises of Leo Brothers Company manufacturing plant as comprising two buildings. But the evidence does show, without any contradiction, that every person connected with the making of the Sanborn Map, and with the fixing of specific rates upon this property, comprising the manufacturing plant of Leo Brothers Company, considered it but one building,

and it is so designated on the Sanborn Map. It is so delineated on the Sanborn Map. Its physical connection is shown conclusively by the uncontradicted testimony of the witness Kimberling, whose evidence is found in the Transcript of Record beginning on page 115 and ending on page 121, and its connection by a common use is shown by the uncontradicted testimony of the witness Veatch throughout the entire transcript.

Then again, the use of the number 240 as descriptive of that part of the building designated on the Sanborn Map as "Vinegar Tanks" was never known to or used by any of the agents of the plaintiffs in error, other than by the witness Veatch, who used it, not as agent of the companies, but as agent of the insured for his own convenience, in cancelling insurance written on the vinegar in the "vinegar tanks" at the special rate of 2.45.

The intent of the witness Veatch to cover vinegar and vinegar stock located at any place within the building in which is located the plant of defendant in error, is shown repeatedly and conclusively time and again at pages 86 to 92 inclusive of the transcript of the record. This evidence of his intent, and understanding of the scope of the policies as written was brought out by the counsel for the appellants in error on cross examination. There is no evidence that any other agent or representative of the plaintiffs in error

had any other understanding than that these policies were to cover vinegar and vinegar stock located in any part of the building upon the premises of the defendant in error.

The only basis that counsel have for making this statement is the mere inference that the representatives of the plaintiffs in error might have understood that the premises of the defendant in error consisted of two separate and distinct buildings and comprised two separate and distinct risks.

But such inferences can never be made to subserve the primary functions of evidence, and we respectfully submit that there is not a scintilla of evidence in this record, other than the fact that a special rate of 2.45 was made upon the "vinegar tanks" and contents when the contracts of insurance were limited to the tanks and contents, to support the contention of counsel for plaintiffs in error.

Taken literally the policies cover vinegar and vinegar stock in any and every part of the building in the manufacturing plant of defendant in error.

It was the understanding of Veatch that such was the effect of the coverage clauses of the policies, and there is no evidence that the managing agents of the appellants in error ever entertained

a different understanding.

The appellants in error are not injured because under the contention of counsel the insurance would have been acceptable if it had been written at the lesser rate.

We therefore most respectfully submit that the Judgment should be affirmed.

FRANK L. MOORE,

For Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN McKUNE,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Eastern District of Washington,
Southern Division.

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN McKUNE,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Eastern District of Washington,
Southern Division.

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UNITED STATES OF AMERICA.

Eastern District of Washington, Southern Division,
United States District Court.

May Term, 1922.

Indictment.

The Grand Jurors of the United States, chosen,
selected and sworn in and for the Southern Division
of the Eastern District of Washington, upon their
oaths present:

FIRST COUNT.

That JOHN McKUNE, whose other or true name
is to the Grand Jurors unknown, late of the County
of Yakima, State of Washington, heretofore, to wit:

on or about the tenth day of April, 1922, at Toppenish, in the Southern Division of the Eastern District of Washington, and within the jurisdiction of this Court, did then and there violate the Act of December 17, 1914, entitled "An Act to provide for the registration of, with Collectors of Internal Revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute or give away, opium or coca leaves, their salts, derivatives, preparations and for other purposes," as amended February 25, 1919, in that he did then and there knowingly, wilfully, unlawfully and feloniously purchase from a person whose name is to the Grand Jurors unknown, a certain derivative of coca leaves, to wit: approximately two grains of cocaine, which cocaine was not then and there in the original stamped package, nor from the original stamped package, as required by law; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States. [1*]

SECOND COUNT.

And the Grand Jurors aforesaid, upon their oaths as aforesaid, do further present:

That JOHN McKUNE, whose other or true name is to the Grand Jurors unknown, late of the County of Yakima, State of Washington, heretofore, to wit: On or about the tenth day of April, 1922, at Toppenish, in the Southern Division of the Eastern District of Washington, and within the jurisdiction

*Page-number appearing at foot of page of original certified Transcript of Record.

of this Court, did then and there violate the Act of December 17, 1914, entitled "An Act to provide for the registration of, with Collectors of Internal Revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute or give away opium or coca leaves, their salts, derivatives, preparations, and for other purposes," as amended February 24, 1919, in that being a person required to register under the provisions of said act, he did then and there unlawfully, wilfully and knowingly have in his possession, with intent to sell, a certain derivative of coca leaves, to wit: approximately two grains of cocaine, without having registered with the Collector of Internal Revenue and without having paid the special tax as required by said act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

THIRD COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That JOHN McKUNE, whose other or true name is to the Grand Jurors unknown, late of the County of Yakima, State of Washington, heretofore, to wit: on or about the tenth day of April, 1922, at Toppenish, in the Southern Division of the Eastern District of Washington, and within the jurisdiction of this court, did then and there violate the Act of December [2] 17, 1914, entitled "An Act to provide for the registration of, with Collectors of Internal Revenue, and to impose a special tax upon

all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away, opium or coca leaves their salts, derivatives, preparations, and for other purposes," as amended February 24, 1919, in that he did then and there knowingly, wilfully and unlawfully sell, barter, exchange, and dispense to one Jack T. Robertson, a certain derivative of coca leaves, to wit: approximately two grains of cocaine, and the said John McKune did then and there sell, barter, exchange, and dispense the aforesaid drugs without and not in pursuance of a written order of the person to whom such article was sold, bartered, exchanged or dispensed on a form issued in blank for that purpose by the Commissioner of Internal Revenue, nor upon receipt of a written prescription, without having registered with the Collector of Internal Revenue and without having paid the special tax as required by said act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

FOURTH COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That JOHN McKUNE, whose other or true name is to the Grand Jurors unknown, late of the County of Yakima, State of Washington, heretofore, to wit: on or about the eleventh day of April, 1922, at Toppenish, in the Southern Division of the Eastern District of Washington, and within the jurisdiction of this Court did then and there violate the Act of

December 17, 1914, entitled "An Act to provide for the registration of, with Collectors of Internal Revenue, and to impose a special tax upon all persons who produce, import, manufacture, [3] compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, preparations and for other purposes," as amended February 24, 1919, in that he did then and there knowingly, wilfully, unlawfully and feloniously purchase from a person whose name is to the Grand Jurors unknown, a certain derivative of coca leaves, to wit: approximately two grains of cocaine, which cocaine was not then and there in the original stamped package, nor from the original stamped package, as required by law; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

FIFTH COUNT.

And the Grand Jurors aforesaid, upon their oaths as aforesaid, do further present:

That JOHN McKUNE, whose other or true name is to the Grand Jurors unknown, late of the County of Yakima, State of Washington, heretofore, to wit: On or about the eleventh day of April, 1922, at Toppenish, in the Southern Division of the Eastern District of Washington, and within the jurisdiction of this Court, did then and there violate the Act of December 17, 1914, entitled "An Act to provide for the registration of with Collectors of Internal Revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute or give away opium or

coca leaves, their salts, derivatives, preparations, and for other purposes," as amended February 24, 1919, in that being a person required to register under the provisions of said Act, he did then and there unlawfully, wilfully and knowingly have in his possession, with intent to sell, a certain derivative of coca leaves, to wit: approximately two grains of cocaine, without having registered with the Collector of Internal Revenue and without having paid the special [4] tax as required by said act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

SIXTH COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That JOHN McKUNE, whose other or true name is to the Grand Jurors unknown, late of the County of Yakima, State of Washington, heretofore, to wit: on or about the eleventh day of April, 1922, at Toppenish, in the Southern Division of the Eastern District of Washington, and within the jurisdiction of this Court, did then and there violate the Act of December 17, 1914, entitled "An Act to provide for the registration of, with Collectors of Internal Revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, preparations, and for other purposes," as amended February 24, 1919, in that he did then and there knowingly, wilfully and unlawfully sell, barter, exchange and

dispense to one Marjorie Robertson a certain derivative of coca leaves, to wit: approximately two grains of cocaine, and the said John McKune did then and there sell, barter, exchange, and dispense the aforesaid drugs without and not in pursuance of a written order of the person to whom such article was sold, bartered, exchanged or dispensed on a form issued in blank for that purpose by the Commissioner of Internal Revenue, nor upon receipt of a written prescription, without having registered with the Collector of Internal Revenue and without having paid the special tax as required by said act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States. [5]

SEVENTH COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That JOHN McKUNE, whose other or true name is to the Grand Jurors unknown, late of the County of Yakima, State of Washington, heretofore, to wit: on or about the twelfth day of April, 1922, at Toppenish, in the Southern Division of the Eastern District of Washington, and within the jurisdiction of this Court, did then and there violate the Act of December 17, 1914, entitled "An act to provide for the registration of, with Collectors of Internal Revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, preparations and for other purposes," as amended Feb-

ruary 24, 1919, in that he did then and there knowingly, wilfully, unlawfully and feloniously purchase from a person whose name is to the Grand Jurors unknown, a certain derivative of coca leaves, to wit: approximately two grains of cocaine, which cocaine was not then and there in the original stamped package, nor from the original stamped package, as required by law; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

EIGHTH COUNT.

And the Grand Jurors aforesaid, upon their oaths as aforesaid, do further present:

That JOHN McKUNE, whose other or true name is to the Grand Jurors unknown, late of the County of Yakima, State of Washington, heretofore, to wit: on or about the twelfth day of April, 1922, at Toppenish, in the Southern Division of the Eastern District of Washington, and within the jurisdiction of this Court, did then and there violate the Act of December [6] 17, 1914, entitled "An act to provide for the registration of with Collectors of Internal Revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute or give away opium or coca leaves, their salts, derivatives, preparations, and for other purposes," as amended February 24, 1919, in that being a person required to register under the provisions of said act, he did then and there unlawfully, wilfully and knowingly have in his possession, with intent to sell, a certain derivative of coca leaves, to wit: approxi-

mately two grains of cocaine, without having registered with the Collector of Internal Revenue and without having paid the special tax as required by said act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

NINTH COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That JOHN McKUNE, whose other or true name is to the Grand Jurors unknown, late of the County of Yakima, State of Washington, heretofore, to wit: on or about the twelfth day of April, 1922, at Toppenish, in the Southern Division of the Eastern District of Washington, and within the jurisdiction of this Court, did then and there violate the Act of December 17, 1914, entitled "An Act to provide for the registration of, with Collectors of Internal Revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, preparations and for other purposes," as amended February 24, 1919, in that he did then and there knowingly, wilfully and unlawfully sell, barter, exchange and dispense to one Jack Robertson a certain derivative of coca leaves, to wit: approximately [7] two grains of cocaine, and the said John McKune did then and there sell, barter, exchange, and dispense the aforesaid drugs without and not in pursuance of a written order of the person to whom such article was sold, bartered, exchanged or dispensed on a form

issued in blank for that purpose by the Commissioner of Internal Revenue, nor upon receipt of a written prescription, without having registered with the Collector of Internal Revenue and without having paid the special tax as required by said act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

TENTH COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That JOHN McKUNE, whose other or true name is to the Grand Jurors unknown, late of the County of Yakima, State of Washington, heretofore, to wit: on or about the thirteenth day of April, 1922, at Toppenish, in the Southern Division of the Eastern District of Washington, and within the jurisdiction of this Court, did then and there violate the Act of December 17, 1914, entitled "An act to provide for the registration of, with Collectors of Internal Revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, preparations and for other purposes," as amended February 24, 1919, in that he did then and there knowingly, wilfully, unlawfully and feloniously purchase from a person whose name is to the Grand Jurors unknown, a certain derivative of coca leaves, to wit: approximately three grains of cocaine, which cocaine was not then and there in the original stamped package, nor from the original stamped

package, as required by law; [8] contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

ELEVENTH COUNT.

And the Grand Jurors aforesaid, upon their oaths as aforesaid, do further present:

That JOHN McKUNE, whose other or true name is to the Grand Jurors unknown, late of the County of Yakima, State of Washington, heretofore, to wit: on or about the thirteenth day of April, 1922, at Toppenish, in the Southern Division of the Eastern District of Washington, and within the jurisdiction of this Court, did then and there violate the Act of December 17, 1914, entitled "An act to provide for the registration of, with Collectors of Internal Revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute or give away opium or coca leaves, their salts, derivatives, preparations, and for other purposes," as amended February 24, 1919, in that being a person required to register under the provisions of said act, he did then and there unlawfully, wilfully and knowingly have in his possession, with intent to sell, a certain derivative of coca leaves, to wit: approximately three grains of cocaine, without having registered with the Collector of Internal Revenue and without having paid the special tax as required by said act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

TWELFTH COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That JOHN McKUNE, whose other or true name is to the Grand Jurors unknown, late of the County of Yakima, State of Washington, heretofore, to wit: on or about the thirteenth [9] day of April, 1922, at Toppenish, in the Southern Division of the Eastern District of Washington, and within the Jurisdiction of this Court, did then and there violate the Act of December 17, 1914, entitled "An act to provide for the registration of, with Collectors of Internal Revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, preparations, and for other purposes," as amended February 24, 1919, in that he did then and there knowingly, wilfully and unlawfully sell, barter, exchange, and dispense to one Marjorie Robertson, a certain derivative of coca leaves, to wit: approximately three grains of cocaine, and the said John McKune did then and there sell, barter, exchange, and dispense the aforesaid drugs without and not in pursuance of a written order of the person to whom such article was sold, bartered, exchanged or dispensed on a form issued in blank for that purpose by the Commissioner of Internal Revenue, nor upon receipt of a written prescription without having registered with the Collector of Internal Revenue and without having paid the special tax as required by said act; contrary to the form of the

statute in such case made and provided, and against the peace and dignity of the United States.

THIRTEENTH COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That JOHN McKUNE, whose other or true name is to the Grand Jurors unknown, late of the County of Yakima, State of Washington, heretofore, to wit: on or about the fourteenth day of April, 1922, at Toppenish, in the Southern Division of the Eastern District of Washington, and within the jurisdiction of this Court, did then and there violate the Act of December [10] 17, 1914, entitled "An act to provide for the registration of, with Collectors of Internal Revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, preparations and for other purposes," as amended February 24, 1919, in that he did then and there knowingly, wilfully, unlawfully and feloniously purchase from a person whose name is to the Grand Jurors unknown, a certain derivative of coca leaves, to wit: approximately one grain of cocaine, which cocaine was not then and there in the original stamped package, nor from the original stamped package, as required by law; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

FOURTEENTH COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That JOHN McKUNE, whose other or true name is to the Grand Jurors unknown, late of the County of Yakima, State of Washington, heretofore, to wit: on or about the fourteenth day of April, 1922, at Toppenish, in the Southern Division of the Eastern District of Washington, and within the jurisdiction of this Court, did then and there violate the Act of December 17, 1914, entitled "An act to provide for the registration of, with Collectors of Internal Revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute or give away opium or coca leaves, their salts, derivatives, preparations, and for other purposes," as amended February 24, 1919, in that being a person required to register under the provisions of said act, he did then and there unlawfully, wilfully and knowingly have in his possession with intent to sell, a certain derivative of coca leaves, to wit: approximately one [11] grain of cocaine, without having registered with the Collector of Internal Revenue and without having paid the special tax as required by said act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

FIFTEENTH COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That JOHN McKUNE, whose other or true name is to the Grand Jurors unknown, late of the county of Yakima, State of Washington, heretofore, to wit: on or about the fourteenth day of April, 1922.

at Toppenish, in the Southern Division of the Eastern District of Washington, and within the jurisdiction of this Court, did then and there violate the Act of December 17, 1914, entitled "An act to provide for the registration of, with Collectors of Internal Revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, preparations, and for other purposes," as amended February 24, 1919, in that he did then and there knowingly, wilfully and unlawfully sell, barter, exchange, and dispense to one Orville Wright, a certain derivative of coca leaves, to wit: approximately one grain of cocaine, and the said John McKune did then and there sell, barter, exchange, and dispense the aforesaid drugs without and not in pursuance of a written order of the person to whom such article was sold, bartered, exchanged or dispensed on a form issued in blank for that purpose by the Commissioner of Internal Revenue, nor upon receipt of a written prescription, without having registered with the Collector of Internal Revenue and without having paid the special tax as required by said Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the [12] *of the United States.*

SIXTEENTH COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That JOHN McKUNE, whose other or true name is to the Grand Jurors unknown, late of the county of Yakima, State of Washington, heretofore, to wit: on or about the fifteenth day of April, 1922, at Toppenish, in the Southern Division of the Eastern District of Washington, and within the jurisdiction of this Court, did then and there violate the Act of December 17, 1914, entitled "An Act to provide for the registration of, with Collectors of Internal Revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away any opium or coca leaves, their salts, derivatives, preparations and for other purposes," as amended February 24, 1919, in that he did then and there knowingly, wilfully, unlawfully and feloniously purchase from a person whose name is to the Grand Jurors unknown, a certain derivative of coca leaves, to wit: approximately two grains of cocaine, which cocaine was not then and there in the original stamped package, nor from the original stamped package, as required by law; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

SEVENTEENTH COUNT.

And the Grand Jurors aforesaid, upon their oaths as aforesaid, do further present:

That JOHN McKUNE, whose other or true name is to the Grand Jurors unknown, late of the county of Yakima, State of Washington, heretofore, to wit: on or about the fifteenth day of April, 1922, at Toppenish, in the Southern Division of the Eastern

District of Washington, and within the jurisdiction of this Court, did then and there violate the Act of December [13] 17, 1914, entitled "An act to provide for the registration of, with Collectors of Internal Revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute or give away opium or coca leaves, their salts, derivatives, preparations and for other purposes," as amended February 24, 1919, in that being a person required to register under the provisions of said Act, he did then and there unlawfully, wilfully and knowingly have in his possession, with intent to sell, a certain derivative of coca leaves, to wit: approximately two grains of cocaine, without having registered with the Collector of Internal Revenue and without having paid the special tax as required by said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

EIGHTEENTH COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That JOHN McKUNE, whose other or true name is to the Grand Jurors unknown, late of the county of Yakima, State of Washington, heretofore, to wit: on or about the fifteenth day of April, 1922, at Toppenish, in the Southern Division of the Eastern District of Washington, and within the jurisdiction of this Court, did then and there violate the Act of December 17, 1914, entitled "An act to provide for the registration of, with Collector of Inter-

nal Revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, preparations, and for other purposes," as amended February 24, 1919, in that he did then and there knowingly, wilfully and unlawfully sell, barter, exchange, and dispense to one Jack T. Robertson, a certain derivative of coca leaves, to wit: [14] approximately two grains of cocaine, and the said John McKune did then and there sell, barter, exchange, and dispense the aforesaid drugs without and not in pursuance of a written order of the person to whom such article was sold, bartered, exchanged or dispensed on a form issued in blank for that purpose by the Commissioner of Internal Revenue, nor upon receipt of a written prescription, without having registered with the Collector of Internal Revenue and without having paid the special tax as required by said Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

FRANK R. JEFFREY,

United States Attorney.

Presented to the Court by the Foreman of the Grand Jury, in open court in the presence of the grand jury and filed in the United States District Court.

Sept. 6, 1922.

ALAN G. PAINE,

Clerk. [15]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

Seventh Day—May, 1923, Term—May 18, 1923.

Court met pursuant to adjournment.

Present: Hon. J. STANLEY WEBSTER, Judge;
FRANK R. JEFFREY, U. S. District Attorney;
H. SYLVESTER GARVIN, Ast. District Attorney;
A. F. KEES, U. S. Marshal; DAVID HYATT, Deputy U. S. Marshal;
E. DARR, Bailiff; PATRICK JORDAN, Bailiff;
ALAN G. PAINE, Clerk.

PROCEEDINGS:

* * * * *

No. 1019.

UNITED STATES OF AMERICA

vs.

JOHN McKUNE.

FRANK R. JEFFREY.
H. SYLVESTER GARVIN.
THOMPSON & DAVIS.
CHARLES BOLIN.

Record of Trial.

* * * * *

The defendant John McKune, appearing in person, was arraigned at the bar of this court, and being asked whether his true name is as it is written in the indictment now on file against him, answered that it is as alleged; and having further

waived the reading of said indictment, for plea thereto says he is not guilty in manner and form as charged therein.

* * * * *

J. STANLEY WEBSTER,
Judge. [16]

In the District Court of the United States for the
Eastern District of Washington, Southern Division.

No. 1019.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN McKUNE,
Defendant.

Verdict.

We, the jury in the above-entitled cause, find the defendant Guilty as to First Count; Guilty as to Second Count; Guilty as to Third Count; Guilty as to Fourth Count; Guilty as to Fifth Count; Guilty as to Sixth Count; Guilty as to Seventh Count; Guilty as to Eighth Count; Guilty as to Ninth Count; Not Guilty as to Tenth Count; Not Guilty as to Eleventh Count; Not Guilty as to Twelfth Count; Guilty as to Thirteenth Count; Guilty as to Fourteenth Count; Guilty as to Fifteenth Count; Guilty as to Sixteenth Count; Guilty as to Seventeenth Count; Guilty as to Eighteenth Count, as charged in the indictment.

W. A. MAY,
Foreman.

Filed May 19th, 1923. Alan G. Paine, Clerk. By
Edward E. Cleaver, Deputy. [17]

In the District Court of the United States for the
Eastern District of Washington, Southern Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN McKUNE,
Defendant.

Motion for New Trial.

Comes now the defendant and moves the Court
that an order be made herein granting defendant a
new trial herein, for the following reasons, to wit:

I.

That the verdict herein was against the evidence,
and against the weight of the evidence.

II.

Error of law occurring at the trial, and excepted
to by the defendant.

III.

That the verdict is contrary to law and evidence.

IV.

That the verdict is against the evidence and the
weight of the evidence upon counts 1, 2, 3, 4, 5, 6,
7, 8, 9, and 16, 17 and 18.

V.

Newly discovered evidence material for defend-
ant, which he could not have discovered with reason-

able diligence and produced at the trial, material for the defendant.

THOMPSON & DAVIS and
CHAS. F. BOLIN,
Attorneys for Defendant.

Service accepted and copy received this 21st day of May, 1923.

FRANK R. JEFFREY,
Atty. for Ptf.

Filed in the U. S. District Court, Eastern District of Washington. May 21, 1923. Alan G. Paine, Clerk. [18]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
JOHN McKUNE,
Defendant.

Motion in Arrest of Judgment.

Comes now the defendant and moves the Court for an arrest of judgment herein for the following reasons, to wit:

I.

That the indictment herein does not state facts sufficient to constitute a crime.

II.

That the indictment herein is duplicitous.

THOMPSON & DAVIS,
Attorneys for Defendant.

Service accepted and copy received this 21st day
of May, 1923.

FRANK R. JEFFREY,
Atty. for Ptf.

Filed in the U. S. District Court, Eastern Dis-
trict of Washington. May 21, 1923. Alan G.
Paine, Clerk. [19]

In the District Court of the United States for the
Eastern District of Washington, Southern Divi-
sion.

Ninth Day—May, 1923, Term—May 21st, 1923.

Court met pursuant to adjournment at 10 A. M.
Present: Honorable J. STANLEY WEBSTER,
Judge Presiding; FRANK R. JEFFREY,
U. S. District Attorney; ALAN G. PAINE
Clerk; D. L. HYATT, Crier; E. DARR and
PAT JORDAN, Bailiffs.

PROCEEDINGS:

* * * * *

No. 1019.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN McKUNE,

Defendant.

Record Third Day of Trial.

And now, on this 21st day of May, A. D. 1923, the above-entitled cause came regularly for trial, defendant John McKune, appearing in person, and with his counsel Messrs. Thompson and Davis, and moves the Court for a new trial, and the plaintiff United States of America appearing by F. R. Jeffrey, United States Attorney, and H. Sylvester Garvin, Asst. United States Attorney, in opposition thereto, and after argument of counsel, and the Court being fully advised in the matter, the said motion for new trial was by the Court denied.

WHEREUPON, the defendant John McKune appearing in person, and with his counsel Messrs. Thompson & Davis, and moves the Court in arrest of judgment on the verdict of the jury, the plaintiff United States of America, appearing by F. R. Jeffrey, United States Attorney, and H. Sylvester Garvin, Asst. United States Attorney, in opposition thereto, and after argument of counsel, and the Court being advised in the matter, the said motion in arrest of judgment was by the Court denied.

J. STANLEY WEBSTER,

Judge. [20]

Thereupon counsel for the defendant excepted to the denial of said motion by the Court, which exceptions were allowed. [21]

In the District Court of the United States for the
Eastern District of Washington, Southern Division.

No. 1019.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN McKUNE,

Defendant.

Sentence of Defendant John McKune.

Now on this 21st day of May, A. D. 1923, the above-named defendant John McKune, appearing in his own proper person for sentence, and being informed by the Court of his conviction therein of record upon the verdict of the jury, and being asked by the Court if he has any legal cause to show, why the judgment of the Court should not now be pronounced in his case, he nothing says, save as he already has said.

WHEREFORE, it is by the Court ORDERED and ADJUDGED, that John McKune, the said defendant now before the Court be confined in the United States Penitentiary at Leavenworth, Kansas, for a period of Five (5) years, without costs of prosecution, and the said defendant is now committed to the custody of the Marshal of the United States to carry this sentence into execution.

J. STANLEY WEBSTER,

Judge. [22]

In the District Court of the United States for the
Eastern District of Washington, Southern Division,

No. 1019.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN McKUNE,

Defendant.

Petition for Writ of Error.

To the Hon. J. STANLEY WEBSTER, Judge of
Said Court:

And now comes John McKune and respectfully shows that on the 19th day of May, 1923, a jury duly empanelled herein found your petitioner guilty of violating the Act of December 17, 1914, as amended February 24, 1919 (Harrison Narcotic Act), upon which verdict final Judgment was entered against said petitioner on the 21st day of May, 1923.

Your petitioner feeling aggrieved by said verdict and judgment, in which judgment and proceedings had prior thereto certain errors were committed to the prejudice of the said defendant, all of which will more fully appear from the assignments of errors and bill of particulars filed herein, petitions this Honorable Court for an order allowing him to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit under

the rules and laws of the United States in such case made and provided.

WHEREFORE defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors so complained of, and that a transcript of the records, proceedings and papers in this cause duly authenticated may be sent to the Circuit Court of Appeals, aforesaid.
[23]

AND SAID PETITIONER FURTHER PRAYS that an order be made approving the bond of your petitioner furnished staying all further proceedings herein until the determination of said writ of error by said United States Circuit Court of Appeals for the Ninth District.

JOHN McKUNE,

Petitioner.

WILLIAM M. THOMPSON,

P. V. DAVIS,

CHARLES F. BOLIN,

Attorneys for Petitioner.

Receipt of copy of the foregoing petition admitted this 2d day of June, 1923.

FRANK R. JEFFREY,

United States District Attorney.

Filed in the U. S. District Court, Eastern District of Washington. June 30, 1923. Alan G. Paine, Clerk. By Edward E. Cleaver, Deputy.
[24]

In the United States District Court for the Eastern
District of Washington, Southern Division.

File No. 1019.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN McKUNE,

Defendant.

Assignment of Errors.

And now comes the defendant, John McKune, and in connection with his petition for a writ of error in this cause makes the following assignment of errors which he alleges occurred upon the trial hereof, and on his motion for new trial, and upon which he relies to reverse the judgment entered herein as appears of record.

I.

The Court erred in overruling the motion of defendant for a directed verdict of not guilty interposed by defendant based upon the ground that any alleged offenses that had been attempted to be proven were shown conclusively and affirmatively to have been established by evidence secured illegally in that the same was not procured by the Government of the United States, but by private parties who called themselves "private investigators" who with the purpose of inducing and entrapping the defendant to commit a crime did induce him to commit a crime, to wit, the crime of selling

prohibited narcotics to such "private investigators," and indirectly and by operation of law, the crimes of purchasing and having in his possession such prohibited narcotics without having complied with the Federal Acts in relation thereto, all as charged in the different counts in the indictment.

II.

Error of the Court in sustaining an objection of the Government to an offer by the defendant to prove by Mrs. Amy Luloff, a witness for defendant, acts of prostitution, or acts [25] from which prostitution could be reasonably inferred on the part of Mrs. Jack Robertson, one of the main witnesses for the Government, who had testified on cross-examination in answer to an interrogatory of defendant as to whether she had ever been a prostitute that she had not.

III.

Error of the Court in overruling defendant's motion for a new trial predicated upon errors of law embodied in assignments of error I and II herein.

WHEREFORE the defendant prays that the judgment of said Court be reversed and this cause be remanded to said District Court and such directions be given that the alleged errors may be corrected and law and justice done in the matter.

WILLIAM M. THOMPSON,
P. V. DAVIS and
CHAS H. BOLIN,

Attorneys for Defendant.

Received copy July 2d, 1923.

FRANK R. JEFFREY,
United States District Attorney.

Filed in the U. S. District Court, Eastern District of Washington. June 30, 1923. Alan G. Paine, Clerk. By Edward E. Cleaver, Deputy. [26]

In the District Court of the United States in and for the Eastern District of Washington, Southern Division.

File No. 1019.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN McKUNE,

Defendant.

Order Allowing Writ of Error.

And now on this 2d day of July, 1923, came the defendant John McKune, by his attorneys and file herein and presented to the Court his petition praying for the allowance of a writ of error intended to be urged by him, praying also that a transcript of the records and proceedings and papers upon which the judgment was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such order and further proceedings may be had as may be proper in the premises, and that an order may be made fixing the bond to stay all further proceedings and bail of defendant until the determination of said writ of error by said Circuit Court of Appeals.

NOW, THEREFORE, on consideration of said petition and being fully advised in the premises, the Court does hereby allow said writ of errors, and

IT IS HEREBY ORDERED that the defendant John McKune may supersede and stay said judgment by filing a bond conditioned as by law provided in the sum of Seven Thousand Five Hundred Dollars for his appearance whenever required according to the conditions of his said bond. Upon filing and approval in said sum all further proceedings are hereby suspended herein until the final determination of said writ of error by said Circuit Court of Appeals, and that said defendant John McKune shall be released from custody pending the hearing and final determination of said writ of error upon filing and approval of such bond.

J. STANLEY WEBSTER,

Judge.

Filed in the U. S. Dist. Court, Eastern District Court. July 3, 1923. Alan G. Paine, Clerk. By Edward E. Cleaver, Deputy. [27]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 1019.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN McKUNE,

Defendant.

Citation (Copy).

To the United States of America and to the Hon.
F. A. JEFFREY, District Attorney for the
Eastern District of Washington, Southern Di-
vision, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the United States District Court, for the Eastern District of Washington, Southern Division, wherein John McKune is plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in the said writ of error, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Dated this 2d day of July, A. D. 1923, at ——.

J. STANLEY WEBSTER,

United States District Judge.

Receipt of copy of the foregoing Citation admitted this 2d day of July, 1923.

FRANK R. JEFFREY,

United States District Attorney.

Filed in the U. S. District Court, Eastern District of Washington. July 3, 1923. Alan G. Paine, Clerk. By Edward E. Cleaver, Deputy. [28]

In the District Court of the United States for
the Eastern District of Washington, Southern
Division.

No. 1019

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN McKUNE,

Defendant.

Citation (Original).

To the United States of America and to the Hon.
F. R. JEFFREY, District Attorney for the
Eastern District of Washington, Southern Di-
vision, GREETING:

You are hereby cited and admonished to be and
appear at a session of the United States Circuit
Court of Appeals for the Ninth Circuit, to be held
in the City of San Francisco, State of California,
within thirty days from the date hereof, pursuant
to a writ of error filed in the Clerk's office of the
United States District Court, for the Eastern Dis-
trict of Washington, Southern Division, wherein
John McKune is plaintiff in error, and you are the
defendant in error, to show cause, if any there be,
why the judgment rendered against the plaintiff in
error, as in the said writ of error, should not be cor-
rected and why speedy justice should not be done
to the parties in that behalf.

Dated this 2d day of July, A. D. 1923, at —.

[Seal]

J. STANLEY WEBSTER,
United States District Judge.

Receipt of copy of the foregoing Citation admitted this 2d day of July, 1923.

FRANK R. JEFFREY,
United States District Attorney. [29]

[Endorsed]: In the United States District Court for the Eastern District of Washington, Southern Division. United States of America, Plaintiff, vs. John McKune, Defendant. Citation. Filed in the U. S. District Court, Eastern Dist. of Washington. Jul. 3, 1923. Alan G. Paine, Clerk. By Edward E. Cleaver, Deputy.

Ent. in G. O. B., Vol. 2, page 470. [30]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 1019.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN McKUNE,

Defendant.

Writ of Error (Copy).

The President of the United States of America, to the Honorable J. STANLEY WEBSTER, Judge of the Above Court, GREETING:

Because of the records and proceedings, as also

in the rendition of the judgment, of a cause which is in the said District Court before you between the United States of America as plaintiff and John McKune as defendant, a manifest error hath happened to the great damage of the said defendant, as by his complaint appears, we being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the party aforesaid in this behalf, to command if judgment be given therein, that under your seal, distinctly and openly, you send the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct the errors, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States of America, this 3d day of July, 1923.

[Seal]

ALAN G. PAINE,

Clerk of the said United States District Court.

By Edward E. Cleaver,

Deputy Clerk.

Service accepted and copy received of foregoing writ of error this 2d day of July, 1923.

FRANK R. JEFFREY,

U. S. Dist. Attorney.

Filed in the U. S. District Court, Eastern District of Washington. July 3, 1923. Alan G. Paine, Clerk. By Edward E. Cleaver, Deputy. [31]

In the District Court of the United States for
the Eastern District of Washington, Southern
Division.

No. 1019.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN McKUNE,

Defendant.

Writ of Error (Original).

The President of the United States of America, to
the Honorable J. STANLEY WEBSTER,
Judge of the Above Court, GREETING:

Because of the records and proceedings, as also
in the rendition of the judgment, of a cause which
is in the said District Court before you between
the United States of America as plaintiff and John
McKune as defendant, a manifest error hath hap-
pened to the great damage of the said defendant,
as by his complaint appears, we being willing that
error, if any hath been, shall be duly corrected
and full and speedy justice done to the party afore-
said in this behalf, to command if judgment be
given therein, that under your seal, distinctly and
openly, you send the record and proceedings afore-
said being inspected, the said Circuit Court of Ap-
peals may cause further to be done therein to cor-
rect the errors, what of right, and according to the

laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States of America, this 3d day of July, 1923.

[Seal]

ALAN G. PAINE,

Clerk of the said United States District Court.

By Edward E. Cleaver,

Deputy Clerk. [32]

[Endorsed]: In the United States District Court for the Eastern District of Washington, Southern Division. United States of America, Plaintiff, vs. John McKune, Defendant. Writ of Error. Filed in the U. S. District Court, Eastern Dist. of Washington. Jul. 3, 1923. Alan G. Paine, Clerk. By Edward E. Cleaver, Deputy.

Ent. in G. O. B., Vol. 2, page 470. [33]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. —.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN McKUNE,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that on the 18th day of May, 1923, this cause came on to be heard before

the Honorable J. Stanley Webster, Judge of said court, and a jury therein duly impaneled and sworn to try said cause; and the United States to maintain the issues on its part called certain witnesses, who, being first duly sworn, testified as follows: [34]

Testimony of Jack T. Robertson, for the Government.

JACK T. ROBERTSON, having been first duly sworn as a witness on behalf of the Government, testified in substance as follows:

That he was a special deputy sheriff of Walla Walla County, Washington. That he went to a place owned by defendant in Toppenish, Washington, at about four o'clock in the afternoon of April 10th, 1922, and asked defendant if I could get some cocaine, and defendant said he guessed I could. We were just inside the front door, and said, "Wait a moment, just a second or two," and stepped into a back room. He said, "How much do you want?" and I said, "A quarter." I stayed there about five minutes and he came back and gave me (identification #1, afterwards Exhibit #1) and I gave him a five dollar bill.

Met him again at his home in Toppenish, alone, between three and five o'clock P. M., April 12th, and purchased (identification #2, afterwards Exhibit #2), for which I paid five dollars.

Again on April 15th, 1922, between 10:00 and 11:00 o'clock in the morning I purchased two bindles of cocaine from him for two dollars.

(Testimony of Jack T. Robertson.)

On cross-examination he said he was a special investigator, and in answer to a question as to his definition of a special investigator he said, "I suppose it is what you would call a 'stool-pigeon.' " That the duties of such special investigator are to catch dope peddlers and bootleggers. He also testified that at the times testified to when he made the purchases from defendant he was not in the employ of the United States Government.

Also the following occurred in his cross-examination:

Q. (Mr. THOMPSON.) You, as I understand your testimony, prior to April tenth, went down there—of course you knew John was selling dope when you went down there, you knew that, did you? A. Yes, sir.

Q. You went, and as I understand on the first occasion, on the tenth, had a conversation with him and asked him if he could [35] get you some cocaine; that is right, isn't it?

A. That is right; yes.

Q. And you asked him, induced him to go and get you some cocaine?

Mr. GARVIN, Assistant U. S. Attorney.—I object to that.

The COURT.—Let him state what happened.

Q. You asked him to go and get you some cocaine? A. I did, sir.

Q. I don't think you finished answering the other question I asked you, and that was, after this con-

(Testimony of Jack T. Robertson.)

versation when you say that you went down there, you went back and paid him five dollars, was it?

A. Yes.

Q. To get some cocaine? A. Yes.

Q. You went back for the purpose of his doing that, didn't you?

A. I went back to get it, yes.

Q. You went back for the purpose of having him make that sale? A. Certainly, I did.

* * * * *

Q. Where did you see him the first time?

A. At his house.

Q. What were you doing at his house?

A. I went there to see him for the purpose of getting cocaine from him on the second occasion.

Q. That is the purpose you went for, to get him to make a sale of cocaine to you? A. Yes, sir.

* * * * *

Q. What did you say to him?

A. I asked him if I could connect again; that is about all the words I had.

Q. When you went down there you went down with the purpose and [36] intention of buying this cocaine from him? A. I did, sir.

Q. And you gave him the money? A. I did.

Q. And he gave you the cocaine? A. Yes.

This witness was further asked on cross-examination if shortly prior to the arrest of defendant and about April 10th, 1922, he did not have a conversation with Frank Swenson, formerly

(Testimony of Jack T. Robertson.)

a police sergeant of the city of Yakima, Washington, in the city of Yakima, Washington, in relation to the defendant John McKune, in which he stated to said Swenson that he was going to "get" John McCune, and if he couldn't get him one way he would get him another, to which question the said witness answered "no."

Testimony of Mrs. J. T. Robertson, for the Government.

Mrs. J. T. ROBERTSON was then duly sworn as a witness on behalf of the Government and in substance testified as follows:

That she visited the place of the defendant in Toppenish on April 11th, 1922. That she went down there with the intent of buying some narcotics from defendant, and asked him if he knew of a certain woman, he said, yes, he did, and I said, "She told me if I ever came to this town and needed anything I could go to you"; he said he knew her; he said, "You wait a little while, the party is not in just now"; so I sat there and waited in his bedroom; when I first went in I took a room just across the hall from his bedroom; then he had me to go in his bedroom and sit down, and we sat there and talked about this woman. I told him what I wanted. He said, "Wait just a moment," I waited there five or ten minutes. He said the party who sold it wasn't there but for me to sit down and wait awhile. I waited between 35 and 40 minutes, I expect. Pretty soon he came in and

(Testimony of Mrs. J. T. Robertson.)

handed me this bindle (Identification #4, afterwards exhibit #4) and I handed him the money, a five-dollar bill. [37]

On cross-examination by Mr. Thompson this witness testified that she was twenty-two years of age, was the wife of Jack Robertson, who had just preceded her on the stand, having married him March 2d, 1922. That she was in the city of Yakima, Washington, prior to this date and in the month of February, 1922. That she had roomed at various rooming-houses, including the Empire, the May and the Merrit, the Merrit being located at the corner of East Chestnut and South Second Streets in said city. Asked if she was engaged in the work of a special investigator at the time she was rooming at the Merrit, she said she did not think so. That at that time Jack Robertson was also rooming there.

Q. He roomed there with you?

A. I wouldn't say for certain.

Q. Would you say you were not rooming together? A. I would not answer either way.

Q. I will ask you if you were ever a prostitute? Have you ever been? A. I was not.

* * * * *

Q. You went down there April 11th; you knew of course that John was selling dope and you went there to get him to sell you some cocaine?

A. I did.

Q. That is the purpose you went down there for?

A. I did.

Q. Are you not an addict?

A. I have never used narcotics.

Testimony of Orville Wright, for the Government.

ORVILLE WRIGHT was then duly sworn as a witness on behalf of the Government, and testified in substance as follows:

That he met the defendant in Toppenish, Washington, April 14th, 1922, about even with the depot. Mr. McEwen had been pointed [38] out to me before I met him there, and I walked over and spoke to him and said, "Mr. McCune, I believe?" and he said "Yes." So I went ahead and talked to him and asked him if he knew where I could get some cocaine. He didn't seem to want to answer me very much and I walked down the track. I cannot just remember the words but anyway he asked me how much I wanted and I told him five dollars' worth. So we walked down the track a little bit longer and left the railroad track and I stayed outside by his place. He went in there by a little gate and when we got to the gate he told me to wait and he would see what he could do for me. This was between eleven and twelve o'clock in the morning. He had some groceries in his arms. I waited about fifteen minutes and he came back and when he came out I said, "Did you make it, Mr. McKune?" and he said "Yes. Give me the money," and I handed him five dollars—a five dollar bill—and he handed me the dope. Here identification #5, afterwards Exhibit #5 was shown witness and he identified the same as the package he purchased from McKune.

(Testimony of Orville Wright.)

On cross-examination the following occurred:

Q. You knew he sold dope?

A. I had been told he did, yes,

Q. What is your business?

A. I guess you would call it a detective. I have been doing detective work for about three years.

Q. At the time you made this purchase from John McKune you were not in the employ of the United States Government? A. No, sir.

Q. You went down there for the purpose and with the intention of getting him (defendant) to make you a sale?

A. I went down there to buy off of him if I could.

These three witnesses also testified that each turned over the purchases immediately to E. G. Flemming, Chief of Police of Toppenish. [39]

Testimony of E. G. Flemming, for the Government.

E. G. FLEMMING, having been first duly sworn as a witness on behalf of the Government, testified in substance, that immediately after the sales testified to by the three preceding witnesses each witness turned such purchase to him, being the identifications 1, 2, 3, 4 and 5, and that he kept possession of the same until he turned them over to E. E. Cleaver, clerk of the court and also U. S. Commissioner before whom the preliminary hearing of defendant was had.

Testimony of L. W. Cole, for the Government.

L. W. COLE, having been first duly sworn as a witness on behalf of the Government, testified that he was Government officer and chemist and analyzed identifications 1, 2, 3, 4, and 5, and that each contained cocaine.

Testimony of E. E. Cleaver, for the Government.

E. E. CLEAVER, having been first duly sworn on behalf of the Government, testified in substance that he was deputy clerk of this court at Yakima, Washington, and a United States Commissioner, and at the preliminary hearing of defendant identifications 1, 2, 3, 4 and 5 had been turned over to him by E. G. Flemming, Chief of Police at Toppenish, Washington, and said identifications had been in his custody ever since up to the time of their introduction as identifications in this trial. Whereupon said identifications were introduced as exhibits herein. The Government moved to dismiss counts 10, 11 and 12 and it was so ordered.

The Government then closed its case.

Whereupon the defendant moved the Court for a directed verdict of "not guilty," which motion was as follows:

Mr. THOMPSON, of Counsel for Defendant.—I wish to make a motion at this time for a directed verdict of not guilty, for the reason that any alleged offenses that have been attempted to have been proven are shown affirmatively and conclusively by

the evidence of the Government, that the evidence was secured not by the Government of the United States, but was secured by parties who induced the defendant, and for the purpose of inducing him to commit a crime, a man whom they knew was committing a crime, and it comes [40] within the rule which has been approved by the federal courts. I have a number of cases here upon that. The distinction is laid down in a number of authorities, and I think there are two or three decisions from this district, two from the Ninth Circuit Court of Appeals, and one decision made by your honorable predecessor who very seldom missed fire on a correct ruling, in the Taylor case from Spokane.

The evidence of these witnesses was that they knew the defendant was selling narcotics. That they went down there, and I asked them particularly, and engaged him in conversation, and asked him if he couldn't get them something, and he said he would try, and upon their inducement that they would pay him, they induced him to get them a narcotic which under the federal law is made an offense to sell, and they did that solely, according to their testimony, for the purpose of getting a conviction against him, solely for the purpose of getting him to commit a crime. The rule as applicable to Government officers is more liberal, but it is held by the federal courts that where that principle underlies that even federal officers will not be permitted to do that, cause a person to commit a crime. They go to the extent that where federal officers have rea-

son to believe that a person is violating either the narcotics or postal acts, that they have a right to use certain means to entrap him and that they, to a certain extent, will be excusable for inducing one to commit a crime, when it is done solely and purely in the interests of the Government and for the purpose of enforcing a law passed by Congress. They are officers of the Government; they are paid and employed by the Government, and it is their duty to see that the revenue laws and other laws passed by Congress upon which these various acts are based are enforced, and therefore they are given a latitude, but it has been held by the Supreme Court of the United States in the leading case of *Graham* that [41] it must not be done with the purpose of having the defendant commit a crime.

Which motion for a directed verdict of not guilty was denied by the Court, the Court stated he would deny the motion at this time but the same could be presented in the trial and on motion for a new trial and the Court would hear counsel further upon this contention.

Whereupon the opening statement was made on behalf of the defendant, and the following testimony introduced on behalf of the defendant:

Testimony of John McKune, on His Own Behalf.

JOHN McKUNE, having been first duly sworn as a witness in his own behalf as defendant, testified in substance as follows:

That he is the defendant in this case and sixty-

(Testimony of John McKune.)

three years of age. That he is the owner of the premises referred to by the witnesses Robertson, Mrs. Robertson and Orville Wright as his home. That said building is a one-story house consisting of nine rooms. A hallway divides the house, with five rooms on one side of said hallway and four rooms on the other side thereof. That in the month of April he was not residing there but had rented the building to Claude Clark and wife, who were then occupying and in possession of said building. That he himself during all of said time was living in another house owned by him situate at 520 East First Avenue in Toppenish, Washington. That he did not have any conversation or transaction with the witness Jack Robertson on April 10th, 1922, and did not sell any cocaine to him or receive from five dollars or any other sum, and had not sold to him exhibit #1, as testified to by said Robertson. That he did not have any conversation or transaction with said Robertson in Toppenish on April 12th, and did not sell any cocaine to him and did not receive five dollars or any other sum from him. That he did not sell exhibit No. 2 to said Robertson, as testified to by said Robertson. [42] That he did not have any conversation or transaction with the said witness Robertson in Toppenish on the 15th day of April, 1922, and sell him two bindles of cocaine for two dollars and receive from said Robertson two dollars or any other sum.

That the testimony of said Robertson in relation

(Testimony of John McKune.)

to these alleged transactions was wholly false and untrue.

That he did not have any conversation or transaction with the witness Mrs. Jack Robertson in Toppenish on April 11th, 1922, and that she did not buy from him exhibit No. 4, and he did not receive from her five dollars, or any other sum. That her testimony in relation to said alleged transaction was wholly false and untrue.

That he did not meet or see the witness Orville Wright near the depot in Toppenish, Washington, and did not have any conversation or transaction with him, and did not sell to him exhibit No. 5, and did not receive five dollars from him, or any other sum. That the testimony of said Orville Wright as to said alleged transaction was wholly false and untrue.

Defendant further testified that about April 1st, 1922, he was with Attorney Charles Bolin in Yakima, Washington, and said Bolin had some business at the police station in Yakima and defendant accompanied him there. While there at said station he had a conversation with John Herrington, then desk sergeant at said station. That the witness Jack T. Robertson happened to be in said station at the time and in the conversation with Herrington said Herrington told defendant that said Jack T. Robertson was a "special officer," or a "stool-pigeon." That the next time defendant saw said Robertson was in Toppenish the evening Chief Flemming raided the building in Toppenish belong-

(Testimony of John McKune.)

ing to defendant, the evening of April 15th, 1922. That defendant himself was at said building at said time having taken one George Denton to [43] said building for the purpose of showing him a stove which Denton was negotiating to purchase.

That the time he had the conversation with Herrington was in the afternoon and it was daylight.

On cross-examination (of Defendant John McKune) the following occurred:

Q. (By Mr. GARVIN.) Have you ever been convicted of a felony?

A. What does a felony consist of?

Q. A felony consists of a crime of which a man was convicted and has been sentenced to be confined in the penitentiary. A. I don't think so.

By Mr. THOMPSON.—We will admit whatever the record shows.

The COURT.—Has he ever been convicted of a crime?

Q. (Mr. GARVIN.) Were you ever convicted of introducing liquor on to an Indian reservation?

A. Yes, sir.

Testimony of John V. Herrington, for Defendant.

JOHN V. HERRINGTON was then duly sworn as a witness on behalf of defendant, and in substance testified as follows:

That he has been a police officer of the city of Yakima for about eleven years to July 1st, 1922. That in the month of April, and about April 1st, 1922, Charles Bolin and defendant were talking to-

(Testimony of John V. Herrington.)

gether. At the time the witness Jack T. Robertson happened to be or come into the station. In the course of the conversation McKune asked him who said Robertson was, and said Herrington told defendant that said Robertson was a special officer, or a stool-pigeon, that at the time witness recalled that Frank Swensen was present but could not testify whether Swenson heard said conversation.

Testimony of Amy Luloff, for Defendant.

AMY LULOFF was then duly sworn as a witness on behalf of the defendant, and in substance testified as follows:

That she was conducting and the proprietress of a rooming-house in the city of Yakima, Washington, known as the Merrit Hotel, [44] situate on the corner of East Chestnut Street and South Second, in the early part of the year 1922, and particularly in January, February and April of said year. In the course of her examination the following occurred:

Q. (By Mr. THOMPSON.) I will ask you if in the early part of 1922 there roomed at your place a woman known as Mrs. Roberston? A. Yes, sir. [45]

Q. Did a man by the name of Jack Robertson room there? A. Yes, sir.

Q. Have you seen those persons in the courtroom or around the courthouse since you have been here? A. Yes, I have.

(Testimony of Amy Luloff.)

Q. Are those the same people that had rooms at your rooming-house? A. Yes, sir.

Q. I will ask you to state whether or not anything was called to your attention as the proprietress of that hotel in relation to the woman who then called herself Mrs. Robertson.

Mr. GARVIN.—I am going to object to that.

Q. As to what she was doing?

The COURT.—Answer that yes or no.

A. Yes, sir.

Q. You may state what it was.

* * * * * * * *

Objection sustained.

At a later time in the trial and before the close of the defense the defendant made the following offer:

By Mr. THOMPSON.—I offer to prove by the witness Mrs. Luloff, that between the month of February and the first of April, 1922, for a period of a week or ten days Mrs. Robertson roomed at her rooming-house and that during a part of the time that said witness Mrs. Robertson was there, a large number of men, different men, came and went from the room of Mrs. Robertson at different hours of the day and unseemly hours of the night, and that finally on account of the situation and the conduct of Mrs. Robertson, Mrs. Luloff was directed and ordered by her to leave the rooming-house of Mrs. Luloff.

The offer was rejected by the Court and an exception allowed to defendant.

**Testimony of L. W. Cole, for the Government—
Redirect Examination.**

Mr. COLE, by consent of the Court and the defendant, was called as a witness on behalf of the Government and testified in redirect [46] examination that “merriwanna” is a Mexican name for Indian hemp, and is used by some whites and Indians, which they smoke. It acts as or has an exhilarating effect and affects the nerves entirely and is not a narcotic. Asked if it was used by people who use narcotics he replied that it could not be used as a substitute for a narcotic. It simply exhilarates the nerves.

Testimony of Frank Swenson, for Defendant.

FRANK SWENSON, being first duly sworn as a witness on behalf of defendant, testified in substance as follows:

That shortly prior to the arrest of the defendant and about April 10th, 1922, he had a conversation with the witness Jack T. Robertson in the city of Yakima, Washington, in relation to the defendant John McKune, in which Robertson made the statement that he was going to “get” McKune, and if he couldn’t get in one way he would get him in another. He further testified that he was at the station at the time Charles Bolin and John McKune came there, about April 10th, 1922, or shortly prior thereto, and saw John Herrington and defendant talking together but did not hear the conversation. That he had formerly been a deputy sheriff of Yakima

(Testimony of Frank Swenson.)

County and for a number of years had been a police officer of Yakima, Washington, and part of the time desk sergeant of said city police.

He further testified that he was acquainted with the general reputation of the witness Jack Robertson for truth and veracity in the community in which he lived and in Yakima during the time he was there, and that said reputation was bad. That his present business was that of operating a detective agency. That he had been employed by Mr. Thompson to hunt up evidence on behalf of the defendant.

Testimony of Frank Colton, for Defendant.

FRANK COLTON, having been duly sworn, said on oath, testified on behalf of defendant in substance as follows:

That he was a laborer and also at times followed professional wrestling. That he knew the witness in March and April, 1922. During part of said time he was rooming at the Pacific Hotel, in Yakima, Washington. That [47] said Robertson and the Witness Orville Wright were rooming at said Pacific Hotel together. There was a woman there too who was the wife of said Robertson, said she was his wife. That he became closely acquainted with said Robertson and was at different parties with him several times. During said time upon an occasion in said hotel he saw said Robertson use either cocaine or morphine. That he had seen him use both cocaine and morphine and also his wife (the

(Testimony of Frank Colton.)

witness Mrs. J. T. Robertson). At one time they three or four capsules of cocaine when I was in the hotel with them. They had three or four capsules of cocaine and they took and opened one capsule and dumped it on a paper and took little pieces of card and picked it up and sniffed it in their noses.

On another occasion in a hotel on Front Street I saw him and a Mexican take morphine and put in a spoon and heat it up and then put in their needle and put it in their arm.

Testimony of Hattie Bullard, for Defendant.

HATTIE BULLARD, having been first duly sworn as witness on behalf of defendant, testified in substance as follows:

That she knew the witness Jack Robertson and saw him the early part of April, 1922. She did not see him use cocaine but she saw him use "merri-wana," and gave her some.

Testimony of George Denton, for Defendant.

GEORGE DENTON, having been first duly sworn as witness on behalf of defendant, testified in substance as follows:

That he had been at the building in Toppenish owned by defendant at the time of the raid on April 15th, 1922, and had gone over there for the purpose of looking at a stove that defendant was negotiating to sell him.

Testimony of Dr. J. Nyewenning, for Defendant.

Dr. J. NYEWENNING, having been sworn as a witness in behalf of defendant, in substance testified:

That he was a physician and surgeon. His qualifications having been admitted, the doctor testified that addicts are untruthful and unreliable. In answer to a question as to what he would say as to a witness who is a user of narcotics could or could not his word be depended on with much reliability, he answered "positively not." [48]

In answer to the question "Can you state whether or not in the chemical world 'meriwanna' is a narcotic, or a derivative of a narcotic?" he answered, "Yes, sir, it is a narcotic."

**Testimony of Frank Colton, for the Government—
(Recalled—Cross-examination).**

The Government then recalled FRANK COLTON for further cross-examination as follows:

Q. (By Mr. GARVIN.) Directing your attention to the month of February, 1923, when you were arrested in the city of Toppenish and you were searched by Mr. Ed. Flemming, Chief of Police of Toppenish, that an affidavit was found in your pocket pertaining to this case, that you told Mr. Flemming that you had to get an affidavit signed by a woman at Cle-elum in the McKune case—that at that time you told Mr. Flemming that Mr. Charles Bolin, one of the attorneys for Mr. Mc-

(Testimony of Frank Colton.)

Kune, had requested you to have that affidavit signed?

Objection. Overruled.

A. No, sir.

Q. Wasn't that affidavit found in your pocket and wasn't it turned over to you by Mr. Bolin?

A. No, sir.

Q. And that affidavit was signed at that time. Did you have an affidavit in this case in your pocket and did you not have a conversation with Mr. Flemming in reference to a woman in some other town who signed the affidavit? A. I did not.

The defendant here closed his case.

IN REBUTTAL, the witnesses Jack T. Robertson and Mrs. J. T. Robertson having been recalled by the Government denied they had used narcotics as testified to by the witness Colton.

Several police officers of the city of Yakima, Washington, were called and duly sworn as witnesses on behalf of the Government, and testified that they were acquainted with the general reputation of the witness Jack T. Robertson in the community for truth [49] and veracity, and that it was good.

**Testimony of E. G. Flemming, for the Government
(Recalled in Rebuttal).**

E. G. FLEMMING was recalled as a witness on behalf of the Government and the following occurred:

Q. (By Mr. GARVIN.) Are you acquainted with a man named Frank Colton? A. Yes, sir.

(Testimony of E. G. Flemming.)

Q. Did you have occasion to search his person at any time in Toppenish about February 23d, 1923?

A. Yes, sir.

Q. Did you find an affidavit on his person signed by a woman in Cle-elum? A. Yes, sir.

Q. Did you have a conversation with him at the time about the McKune case? A. Yes, sir.

Q. What was the conversation?

A. I asked him how he happened to have that affidavit in his pocket and he said Mr. Bolin the attorney had sent the affidavit with him to have a party in Cle-elum sign it.

Q. Do you recall the name of the party?

A. No, sir.

Q. Was it signed? A. It was. [49½]

That upon the conclusion of the testimony and when both the plaintiff and defendant had rested the Court instructed the jury as follows:

Instructions of Court to Jury.

The COURT (Orally).—In connection with all the counts, I instruct you that if you find from the evidence beyond a reasonable doubt that the substance introduced in evidence is cocaine and that cocaine is a salt or derivative of coca leaves, it is immaterial as to the amount in each package so far as the element of the offense itself is concerned; you are at liberty to take into consideration the evidence in the case concerning the amount contained in each package as shedding light upon the question of whether or not the witnesses made the

purchases at the times and places and under the circumstances testified to by them.

The defendant in this case has interposed a plea of not guilty and the effect of that plea is to place in issue all the material allegations in each and every of the counts contained in the indictment and to cast upon the Government the burden of providing each and every of the material allegations beyond a reasonable doubt. In this connection I instruct you that every person accused of crime is presumed to be innocent; that is one of the defendant's important rights. It is a substantial part of the law of the land. It is not a mere fiction which you may disregard at pleasure, but it is one of the safeguards and protections which the law in its wisdom places around every person accused of crime; it attaches to the accused and continues with him throughout all stages of the trial and throughout all the stages of your deliberations as jurors until the defendant's guilt has been established by competent evidence beyond a reasonable doubt and notwithstanding such a presumption of innocence.

[50]

By reasonable doubt as used in these instructions is meant in law just what those words in their ordinary and everyday use imply. They have no technical, legal meaning different from their ordinary commonsense meaning. A reasonable doubt is a doubt that is based upon a reason. It has been defined to be such a doubt as, if entertained by a man of ordinary prudence, intelligence and decision, in dealing with the graver or more important affairs

of life, such for example as is the outcome in this case to this defendant, would have influence with him or cause him to pause and hesitate before acting thereon. It must be a real and substantial doubt and must arise out of a fair, practical, commonsense consideration of the evidence in the case. You must not resort to imaginations and invention merely as an excuse for finding the defendant not guilty; neither must you find the defendant guilty unless you are able to say in your consciences that you have an abiding conviction to a moral certainty of the defendant's guilt.

If after analyzing all the evidence in the case, you are able to say that you have an abiding conviction of the defendant's guilt to a moral certainty, then you are convinced beyond a reasonable doubt; if you are unable so to say, then you do have a reasonable doubt and such doubt must be resolved in favor of the accused.

In this connection I charge you that public policy forbades that officials charged with the enforcement of the law should seek to have the laws violated, and that those whose duty it is to detect criminals should make criminals; so that when an officer induces a person who has no intention of violating the law to violate the law, the courts will not lend their assistance to the prosecution of one so allured and induced to commit a crime.

If in this case the witnesses had reasonable grounds to [51] suspect that the defendant was dealing in narcotics and their action was taken in an effort to detect crime and not to induce the com-

mission of crime, then such action was lawful, and if the defendant possessed or sold narcotics as charged in the indictment he is guilty.

If, on the other hand, you find the action of the witnesses was taken in bad faith and for the purpose of inducing and inciting the defendant to commit the offense charged, and that they in fact induced the original intent on the part of the defendant to possess and deal in narcotics, you will find the defendant not guilty.

In other words, if an intent and purpose to possess, purchase or sell narcotics had been formed in the mind of the defendant before meeting the witnesses and having the transactions with him, if such transactions occurred, and defendant was already engaged in the business, then the action of the witnesses in gleaning the evidence was proper and such means were proper in gleaning the evidence.

On the other hand, if the defendant was not dealing in narcotics and had no intention of so doing, and the action of these witnesses had the effect of inducing him to engage in the business and to violate the law, and to inspire in his mind a purpose to become a criminal, then that would not be sufficient and the defendant should be found not guilty.

In this connection I deem it proper to say to you that where it appears that a witness is employed and paid for the purpose of gleaning and gathering evidence to be used in proving crime it is the duty of the jury to view the testimony of such witness with caution and to take into consideration those ele-

ments in appraising its moral worth. It does not follow as a matter of law that a person so employed is incapable of telling the truth, [52] but it is for you to determine, in view of all the facts and circumstances disclosed from the witness-stand, taking into account the character of the witness and his employment, as I have indicated, and in the light of all the circumstances appraising it as of that moral value and convincing force as in your reasonable judgment as men experienced in the ordinary affairs of life believe it is justly and fairly entitled to receive.

The function of the jury in a trial of a case of this sort, and its sole function, is to determine what is the evidence in the case and what weight and credit shall be given the several witnesses who have appeared and testified before you. Into that field nobody has a right to enter; it is your sole province. It is your duty in analyzing the evidence in this case to take into consideration the conduct and demeanor of the several witnesses while testifying before you, the intelligence or lack of intelligence of a witness, as it is made to appear; the reasonableness or unreasonableness of the testimony given by the witness, the knowledge or lack of knowledge of the witness upon the subject to which he testifies, his opportunity or lack of opportunity for knowing or being informed concerning the matter to which he testifies, the readiness or reluctance of a witness in testifying, his apparent candor or frankness or lack of those qualities, if any appears, the interest or lack of interest any witness may have in the out-

come of your verdict, and in the light of all the facts and circumstances surrounding the witness as disclosed from the witness-stand, give the testimony of each witness that fair and candid consideration and weight which in your reasonable judgment as men versed in the ordinary affairs of life it appeals to your consciences as being justly and rightly entitled to receive.

In considering the evidence in the case, gentlemen of the jury, you should consider it carefully in connection [53] with the material allegations of each count in the indictment as I have endeavored to explain to you what the material allegation of these several counts are, and as to any and all counts upon which you entertain a reasonable doubt, you should find the defendant not guilty; and as to any and all counts upon which you are convinced of the guilt of the defendant by the evidence in the case beyond all reasonable doubt, measured by the rules I have given you and taking into consideration the presumption of innocence as I have defined it to you, upon any such counts you should find the defendant guilty.

For your convenience there will be submitted to you forms of verdict upon which certain appropriate blanks will be left. Upon your agreeing upon a verdict, you will fill in the blanks corresponding with your conclusions and appropriate to express your verdict; you will select one of your number, as foreman, and he will sign the verdict after you have agreed upon it, and return it into court.

I instruct you, gentlemen of the jury, that if you find in this case any witness has deliberately and wilfully testified falsely concerning any material fact in this case, then and in that event you are at liberty to disregard the entire testimony of such witness, except in so far as you may find it to be corroborated by other credible evidence in the case and by known and established fact.

In considering the evidence in this case, gentlemen, I charge you that it is not sufficient for you to find merely that the evidence adduced is consistent with the theory of the defendant's guilt; before you can find the defendant [54] guilty, you must believe beyond a reasonable doubt that it is insistent with his innocence and inconsistent with every other reasonable hypothesis except that of guilt.

It is competent in the trial of a case to show that any witness is addicted to the use of a narcotic drug, and also to show what is the effect and consequences of the use of such drug and such addiction upon the mental and moral faculties of the one so addicted. If in this case you find that any witness was or is addicted to the use of a narcotic and in virtue of such addiction is so unstable mentally or morally as to be unworthy of belief at your hands, you are at liberty to disregard the testimony of that witness; on the other hand, if you find that *nor* witness testifying in the case was or is addicted to the use of a narcotic drug, then the evidence relating to that subject will be discarded from your consideration; upon the other hand, if you find *find*

some witness was so addicted, you do not necessarily have to disregard his testimony, but in determining the weight and credit you will attach to his testimony, you are at liberty to take into consideration, together with such addiction, if any, upon the ethical and moral qualities of the witness and its effect upon his moral principles. [55]

And thereupon the jury retired to consider their verdict and thereupon on the 19th day of May, 1923, the jury returned with their verdict finding the defendant guilty as charged in all the counts of the indictment, except the tenth, eleventh and twelfth counts, which last three counts had been previously dismissed upon motion of the United States District Attorney.

And thereupon the defendant, by his counsel, moved the Court for a new trial on the following grounds:

1. That the verdict was against the evidence, and against the weight of evidence.

2. Error of law occurring at the trial and excepted to by the defendant.

3. The verdict is contrary to law and evidence.

4. That the verdict is against the evidence and the weight of the evidence upon counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 16, 17 and 18.

5. Newly discovered evidence material for defendant which he could not have discovered with reasonable diligence and produced at the trial, material for the defendant.

Which said motion was denied by the Court and exception allowed.

In ruling upon defendant's motion for a new trial the Court assumed and considered that the defendant had renewed his motion for a directed verdict of not guilty, which he had interposed at the close of the Government's testimony, on the same grounds specified and urged at the close of the Government's case and after the plaintiff had rested.

And thereupon the defendant moved the Court to arrest judgment upon said verdict of the jury on the following grounds:

1. That the indictment does not state facts sufficient to constitute a crime.

2. That the indictment is duplicitous.

After argument of counsel the Court denied said motion in [56] arrest of judgment, to which ruling of the Court the defendant excepted, which exception was allowed by the Court.

The Court rendered no opinion in making its rulings and decisions denying defendant's motion for a new trial and in arrest of judgment.

And thereupon on the 21st day of May, 1923, the Court entered judgment against said defendant adjudging him guilty as charged in the indictment (except as to Counts 10, 11 and 12) and thereupon the Court sentenced the defendant to be imprisoned in the United States Penitentiary at Fort Leavenworth, Kansas, for the period of five years.

AND NOW, because the foregoing matters and things are not of record in this case, I, J. Stanley Webster, the Judge who tried the above-entitled

cause in the above-entitled court, do hereby certify that the foregoing BILL OF EXCEPTIONS correctly and fully states the proceedings and all thereof and contains and fully and accurately sets forth all of the testimony and evidence adduced upon the trial of said cause and contains all of the instructions of the Court to the jury, and truly states the rulings of the Court upon the questions of law presented and the objections and exceptions taken by the defendant appearing therein were duly taken and allowed; that said Bill of Exceptions were prepared and submitted within the time allowed by law and the rules of the Court and is now signed and settled as and for the Bill of Exceptions in said cause, and the same is hereby now ordered to be made a part of the record in said cause.

It is further ordered that all of the original exhibits introduced in evidence in the trial of this cause and now in the custody of the Clerk of this court be made a part of this Bill of Exceptions and filed therewith, and need not be printed [57] but shall be attached to the record and transmitted by said Clerk to said United States Circuit Court of Appeals for the Ninth Circuit.

IN WITNESS WHEREOF I have hereunto set my hand this 1st day of October, 1923.

J. STANLEY WEBSTER,
United States District Judge.

Due service of the attached Bill of Exceptions and receipt of a true copy thereof admitted this 1st day of October, 1923.

FRANK R. JEFFREY,
United States District Attorney.

Filed in the U. S. Dist. Court, Eastern Dist. of Washington. October 1, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy.

In the District Court of the United States, for the Eastern District of Washington, Southern Division.

File No. 1019.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN McKUNE,

Defendant.

Praeipce for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare transcript for the record in the above-entitled cause to be heard on a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit containing true copies of the following documents and papers and records in said above cause, to wit:

1. Indictment. 2. Arraignment and plea. 3. Verdict. 4. Motion for new trial. 5. Motion in

arrest of judgment. 6. Journal entry showing overruling thereof and exception. 7. Judgment and sentence. 8. Petition for writ of error. 9. Assignment of errors. 10. Order allowing writ. 11. Citation. 12. Writ of error. 13. All proofs of service. 14. Endorsements and file-marks appearing on any of said papers. 15. This praecipe. 16. Bill of exceptions.

WILLIAM M. THOMPSON,
P. V. DAVIS,
CHAS. F. BOLIN,

Attorneys for Defendant.

We waive the provisions of the Act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing as provided under Rule 23, of this court, as amended to October 25, 1922.

WILLIAM M. THOMPSON,
P. V. DAVIS,
CHAS. F. BOLIN, [60]

Attorneys for Defendant.

[Endorsed]: Filed in the United States District Court, Eastern District of Washington, Southern Division. November 13th, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [61]

In the District Court of the United States, for
the Eastern District of Washington, Southern
Division.

No. 1019.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN McKUNE,

Defendant.

**Certificate of Clerk U. S. District Court to Tran-
script of Record.**

United States of America,
Eastern District of Washington,—ss.

I, Alan G. Paine, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages to be a full, true and correct copy of so much of the records, papers and other proceedings in the foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitutes the record of appeal on writ of error from said United States District Court for the Eastern District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the original writ of error and citation are transmitted herewith as a part of said appeal.

I further certify that the cost of preparing the foregoing transcript of record amounts to the sum of Twenty-two and 50/100 Dollars, which amount has been paid by attorneys for the plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at Yakima, Washington, this 13th day of November, A. D. 1923.

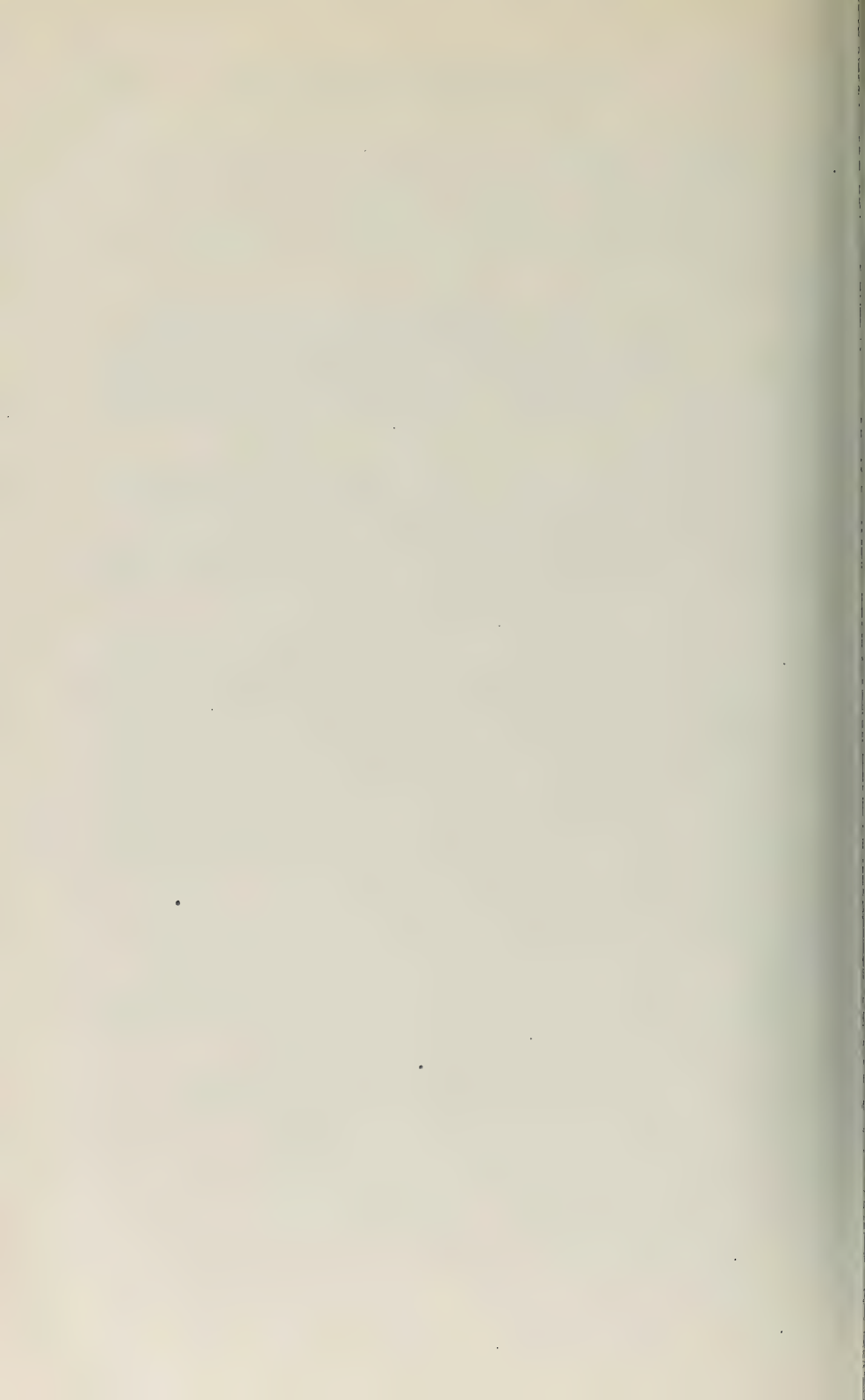
[Seal] ALAN G. PAINE,
Clerk U. S. District Court, Eastern District of
Washington. [62]

[Endorsed]: No. 4144. United States Circuit Court of Appeals for the Ninth Circuit. John McKune, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Eastern District of Washington, Southern Division.

Filed November 17, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.



United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN McKUNE,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Upon Writ of Error to the United States District Court of
the Eastern District of Washington,
Southern Division.

BRIEF OF PLAINTIFF IN ERROR.

Hon. J. STANLEY WEBSTER, Judge.

WILLIAM M. THOMPSON,

P. V. DAVIS,

Wilson Bldg., Yakima, Wash.,

CHAS. F. BOLIN,

Toppenish, Wash.,

Counsel for Plaintiff in Error.

No. 4144.

United States
Circuit Court of Appeals

For the Ninth Circuit.

JOHN McKUNE,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Upon Writ of Error to the United States District
Court of the Eastern District of Washing-
ton, Southern Division.

Brief of Plaintiff in Error.

STATEMENT OF THE CASE.

The indictment contains eighteen counts, which constitute six separate charges of purchase, possession and sale of narcotics upon six separate occasions and defendant was found guilty upon all counts except the tenth, eleventh and twelfth.

The evidence of the Government consisted chiefly of the testimony of three private detectives, Jack T. Robertson, Mrs. J. T. Robertson and Orville Wright. Jack Robertson described his business as a special investigator, or a stool-pigeon.

Jack Robertson testified that on April 10th, 1922, he purchased of defendant cocaine (Exhibit No. 1) for which he paid defendant five dollars. That on April 12th, 1922, he purchased of defendant cocaine (Exhibit No. 2), for which he paid five dollars.

That on April 15th, 1922, he purchased two bindles of cocaine from defendant for which he paid defendant two dollars.

Mrs. J. T. Robertson testified she purchased cocaine from the defendant (identification No. 4) on April 11, 1922, for which she paid the defendant \$5.00 (five dollars).

Orville Wright testified that on April 14, 1922, he purchased from the defendant cocaine (exhibit No. 5) for which he paid defendant five dollars (\$5.00).

On cross-examination these three witnesses admitted that they were not in the employ of the United States Government; that they were special detectives, or private investigators or stool-pigeons. The woman, Mrs. J. T. Robertson, upon cross-examination in answer to the question, had she ever been a prostitute, replied in the negative.

The defendant in his case offered to prove by the witness, Amy Luloff, actions and conduct of said witness Mrs. Robertson, proving that the said Mrs. Robertson had been prostituting.

The defendant at the close of the Government's case moved for a directed verdict on the ground that the Government's evidence clearly showed an entrapment by the private detectives, Jack Robertson, Mrs. J. T. Robertson, and Orville Wright; that such entrapment by private detectives who were

not United States officers and not employed by the United States Government for the purpose of enforcing revenue laws or congressional acts brought case within the rule that the defendant was entitled to an acquittal upon that class of testimony.

The Court overruled the motion but stated that the question could be renewed upon a motion for new trial.

The defendant was found guilty upon (15) fifteen counts; and motion for a new trial was duly presented and denied to which ruling exception was taken and allowed.

There are but two points which are covered by three assignments of error.

The assignments of error numbers 1 and 3 go to the same point.

I.

ASSIGNMENTS OF ERRORS.

The Court erred in overruling the motion of defendant for a directed verdict of not guilty interposed by defendant based upon the ground that any alleged offenses that had been attempted to be proven were shown conclusively and affirmatively to have been established by evidence secured illegally in that the same was not procured by the Government of the United States, but by private parties who called themselves "private investigators," who with the purpose of inducing and entrapping the defendant to commit a crime did induce him to commit a crime, to wit, the crime of selling prohibited narcotics to such "private investigators," and indirectly and by operation of law, the crimes of purchasing and having in his possession such

prohibited narcotics without having complied with the Federal Acts in relation thereto, all as charged in the different counts in the indictment.

II.

Error of the Court in sustaining an objection of the Government to an offer by the defendant to prove by Mrs. Amy Luloff, a witness for defendant, acts of prostitution, or acts (25) from which prostitution could be reasonably inferred on the part of Mrs. Jack Robertson, one of the main witnesses for the Government, who had testified on cross-examination in answer to an interrogatory of defendant as to whether she had ever been a prostitute that she had not.

III.

Error of the Court in overruling defendant's motion for a new trial predicated upon errors of law embodied in assignments of error I and II herein.

Minds of reasonable men can differ as to the solution of these points.

The view of appellant is that when an entrapment is to be permitted to secure conviction for violation of a Federal law the entraper, at least, should be an officer of the Government or in the employ of the Government or have some standing, other than being a mere stool-pigeon or special detective of doubtful character.

Some of the authorities that support this view are,

Grimm vs. United States, 156 U. S. 604, 39
L. Ed. 550.

Andrews vs. United States, 162 U. S. 420, 40 L. Ed. 1023.

Woo Wai vs. United States, 223 Federal, 412.

Butts vs. United States, 273 Fed. 35.

As to assignment number II, the defendant offered to prove that one of the main witnesses for the Government was a prostitute by showing acts of prostitution on her part, after the witness in answer to a question on cross-examination, as to whether she was a prostitute, testified she was not and she never had been. The Court sustained the objection of the Government.

Some authorities hold that under the circumstances the defendant is bound by her answer, while others take a broader view and hold that the material question that the jury may pass on is the credibility of the witness and whether or not, in fact and truth, she is a prostitute.

State vs. Jackson, 83 Wash. 504, pg. 527.

In the opinion by Judge Chadwick, he said:

"It is not the manner of proof that concerns the law so much as the object sought to be attained, for, as said by this Court in the *Coella* case, a woman cannot ruthlessly destroy that quality upon which most other good qualities are dependent and for which, above all others, a woman is revered and respected, and retain her reputation for truthfulness unsmirched. We can mark no distinction between receiving evidence as to the reputation of a witness for truth and veracity and receiving evidence of reputation as to moral charac-

ter, when this Court has said that a reputation for immorality is a thing to be considered when passing upon the credibility of a witness.”

State vs. Wingard, 92 Wash. 219, 158 Pac. pg. 728.

Tla-Koo-Yel-Lee vs. United States, 167 U. S. 274, 42 L. Ed. 166.

State vs. Pickle, 200 Pac. 319, 116 Wash. 600.

We do not think any human being should be sent to the penitentiary upon the class of evidence relied upon by the Government in this case.

The writer of this brief has been confined to his bed for nearly two months and has been unable to give the Court the benefit of an elaborate investigation of the questions involved, made prior to determining to present an appeal.

His associate, Mr. Davis, has not been with him for some time and Mr. Bolin has been away a great deal of the time, and left the preparation of this brief to the writer.

On behalf of the appellant we trust that the Court, with the assistance with the few authorities cited, will be able to comprehend the contentions of the appellant as fully as if it had the benefit of a long brief.

Very respectfully submitted by,

WILLIAM M. THOMPSON,

P. V. DAVIS,

Wilson Bldg., Yakima, Wash.,

CHAS. F. BOLIN,

Toppenish, Washington,

Counsel for Plaintiff in Error.

IN THE
United States
Circuit Court of Appeals
For The Ninth Circuit

JOHN McKUNE,

Plaintiff in Error,

vs.

No. 4144

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Defendant in Error

FRANK R. JEFFREY,

United States Attorney,

H. SYLVESTER GARVIN,

Assistant United States Attorney,

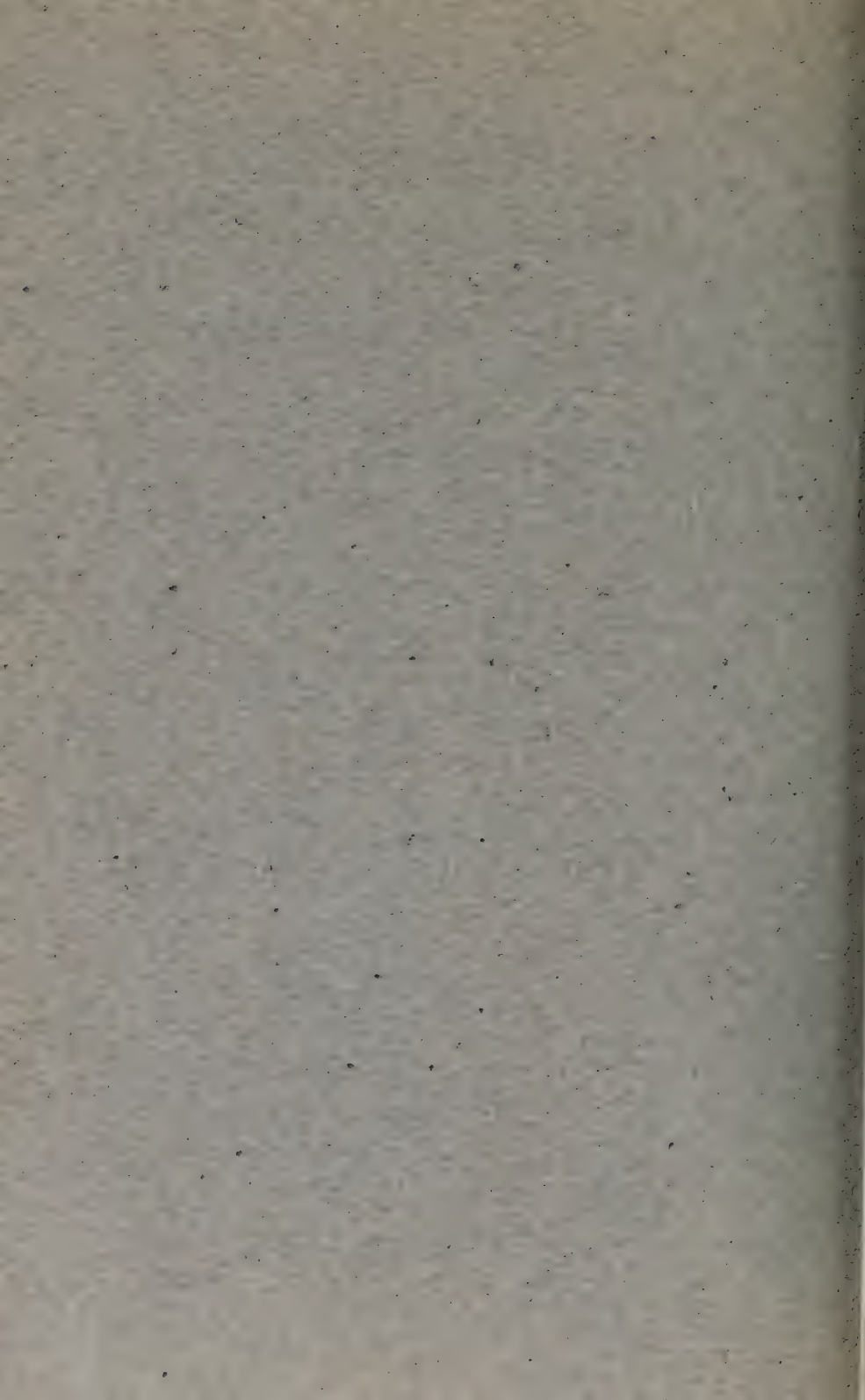
331 Federal Building,

Spokane, Washington,

Attorneys for Defendant in Error.

Filed

Clerk.



IN THE
United States
Circuit Court of Appeals
For The Ninth Circuit

JOHN McKUNE,,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

No. 4144

Brief of Defendant in Error

Briefly, the facts involved in this case are as follows:

The defendant was indicted by the Grand Jury charging in eighteen counts the violation of certain provisions of the Harrison Narcotic Act. A verdict of guilty was rendered by the jury on all counts, except the tenth, eleventh and twelfth, and upon these counts the government offered no proof, and when it rested its case, moved the court for permission to dismiss, as shown by the record on page 45.

For the convenience of the court, it may be stated at this time that all of the counts in the indictment were predicated upon six transactions charging from the 10th day of April, 1922, to the 15th day of April, 1922. All of the counts are similar and identical in form, except

that on each date the third count, which alleges a sale, is made to different parties. For instance, the first count charges the purchase of a quantity of cocaine. The second count charges, on the same date, the possession of the same amount, with intent to sell, and the third count charges the sale of the same amount at the same time and place to the witness J. T. Robertson; and this follows throughout the entire indictment, the only change being in the amount of cocaine, the dates upon which the transactions were executed and the party to whom the same was made.

For the sake of clearness, we will follow the assignments of error in the order adopted by counsel in his brief on behalf of the plaintiff in error.

ARGUMENT

1.

The first assignment of error deals exclusively with the question of entrapment and upon which point counsel cites the case of *Grimm v. United States*, 156 U. S. 604, *Andrews v. United States*, 162 U. S. 420, *Woo Wai v. United States*, 223 Fed. 412 and *Butts v. United States*, 273 Fed. 35.

Discussing first the *Butts* case, we have no complaint to find with this decision other than that it is not applicable to the case at bar. In that case the officers incited a person to commit a crime, who had no intention to do so and it was only upon the inducements and entrapments of the officers that he permitted himself to become their victim. It is our opinion that this case

clearly states the law upon the subject in a case of that character. However, in the case at bar the defendant makes no plea of an entrapment. His own testimony, both on direct and cross-examination, as shown by the record, forecloses any such contention, for his testimony, briefly, is that he never met any of the parties whom the government alleged, and who testified at the trial had met him on the days in question, had several discussions with him and to whom he sold the narcotic drugs.

He further denied ever having sold any narcotic drugs to the parties alleged in the indictment, and, furthermore, tends to establish an alibi that he was not present at the places in question at the time the government alleged and the jury found that the cocaine was sold.

The other three cases cited by the plaintiff in error are certain and positive opinions in upholding the government's contention in this case. As this issue has been passed upon by this court in two recent cases, we feel that a further discussion of it is unnecessary and cite.

Fiunkin v. United States, 265 Fed. 1;

Ritter v. United States, 293 Fed. 187.

The following citations are also applicable to the point at issue:

Billingsley v. United States, 274 Fed. 86;

Fisk v. United States, 279 Fed. 12;

Lucadamo v. United States, 280 Fed. 653;

Smith v. United States, 284 Fed. 673;

Ramsey v. United States, 268 Fed. 825;

Rossi v. United States, 293 Fed. 896.

2.

The third assignment of error is based upon the first and second, and must necessarily be bound by the result therein.

The second assignment is as follows:

“Error of the Court in sustaining an objection of the Government to an offer by the defendant to prove by Mrs. Amy Luloff, a witness for defendant, acts of prostitution, or acts from which prostitution could be reasonably inferred on the part of Mrs. Jack Robertson, one of the main witnesses for the Government, who had testified on cross-examination in answer to an interrogatory of defendant, as to whether she had ever been a prostitute, that she had not.”

In support of this contention counsel for the plaintiff in error cites a number of cases from the Supreme Court of the State of Washington, and the case of *Tla-Koo-Yel-Lee v. United States*, 167 U. S. 274. The court in discussing some of the issues involved in that case, does not specifically pass upon the question raised here by counsel, but owing to the strained facts and circumstances connected with the case, the court passes over the issue partially raised there without any extended discussion and we are of the opinion that the holdings in the federal courts upon the question of collateral issues is much different than that contended for by counsel for the plaintiff in error.

Jones on Evidence, at page 1068, paragraph 840, discusses the question as follows:

“Although we have seen that in many jurisdictions much latitude is allowed in cross-examination to effect the credibility of witnesses by proof of specific acts or misconduct, *it must not be inferred that this allows independent or extrinsic evidence of such acts. The rule is very general that the inquiry is confined to cross-examination, and, further, that the evidence of the witnesses on such collateral matters can not be contradicted.* The rule followed in many states by which the witness can be cross-examined as to specific facts tending to disgrace him, often works great hardship, and it would be intolerable that any witness might be surprised by an array of witnesses and compelled to defend past transactions having no connection with the suit. In various states evidence of this character is forbidden by statute.” (Italics ours).

Cyc., in Volume 40, at pages 2600, 2601, 2602 and 2603, on this subject, is as follows:

“*The attack must be confined to the general character or reputation of the witness and not directed to any particular trait of character, except, of course the lack of veracity, nor can the witness be impeached by showing particular facts or that he has committed particular wrongful or immoral acts.* So a witness can not be impeached by the evidence showing particular instances in which he has been untruthful or corrupt or dishonest, *particular acts of unchastity or immorality* or the maintenance of illicit relations with a particular individual. Circumstances or occurrences indicating a lack of morality, that he is living apart from his wife, intoxication upon particular occasions, or the commission of crimes of which the witness has not been convicted. *The rule is, however, subject to an exception in the case of a conviction of crime, and, according to some authorities, does not apply on the*

cross-examination of the witness himself." (Italics ours).

The following, in support of this rule, is taken from 28 Ruling Case Law, paragraph 202, at page 613:

"The rule is firmly established that a witness can not be impeached by showing the falsity of his testimony concerning facts formerly stated and answered by a witness upon cross-examination upon a merely collateral matter can not be contradicted. *If he be asked as to a collateral fact, his answer is conclusive upon the party examining him.*" (Italics ours).

In the case of *Fisk v. United States*, 279 Fed. 12, at page 17, (C. C. A.) the court, in discussing this issue, states the following:

"It is also assigned as error that the court improperly limited counsel for defendant in his cross-examination of the witness Harris, particularly in reference to whether the witness was intimate with a certain negro woman who at that time lived on Welling Street in the City of Memphis. Before an objection was interposed to this question, the witness answered that he was not. This, of course, was the end of that inquiry, even though it were conceded that the credibility of the witness could be impeached in this manner. It was purely collateral to the issue on trial and counsel was bound by the answer of the witness. Citing the *Hanover Fire Ins. Co. v. Dallavo*, 274 Fed. 258, (C. C. A.)"

The Seventh Circuit Court of Appeals in the case of *Daniels v. United States*, 196 Fed. 459 at page 464, discussing a similar question, expresses the rule as follows:

"This ruling was right. Hassel's credibility as a witness could not be tried by raising and trying an independent issue as to his honesty, his interest or his motives."

A similar question is discussed in *Bullard v. United States*, 245 Fed. 837, Fourth Circuit. There the court in passing upon the question states at page 840:

“We are not aware of any theory upon which this ruling can be defended. The subject matter of the question, addressed to Bullard, was obviously collateral to the issue on trial and the government was bound by his answer. Indeed, it is elementary that contradiction in such case is not ordinarily permissible.”

See also *Miller v. Territory of Oklahoma*, 149 Fed. 330, *Teese v. Huntingdon*, 64 U. S. 2 (23, Wall.), *Young v. Corrigan*, 208 Fed. 431.

For the sake of argument let us assume that the trial court may have committed error in refusing to permit such a question to be answered by the witness, Mrs. Robertson. The sentence in this case was a commitment in the United States penitentiary at McNeil Island for a period of five years, which sentence can be sustained by any single count in the indictment. The only counts to which the witness, Mrs. Robertson, testified were counts four, five and six, the government offering no proof on counts X, XI and XII of the indictment. This leaves counts I, II, III, VII, VIII, IX, XVI, XVII and XVIII sustained by the witness Jack T. Robertson and others, and counts XIII, XIV and XV by the witnesses Orville Wright and others. So in the instant case it could not have had any prejudicial effect upon the plaintiff in error, as the verdict and sentence are sustained by other counts, not considering counts IV, V and VI.

The record on page 44 clearly establishes that the informants used by the government as witnesses were in

the employ of E. G. Fleming, the chief of police of Toppenish, Washington, and that they had information that the plaintiff in error had been selling and distributing narcotic drugs prior to the time that any of the witnesses on behalf of the government met plaintiff in error McKune; that he had possession of the drugs and was a willing vendor to any prospective purchasers, so we respectfully submit that there is no basis for the defense of an entrapment, that no error was committed by the trial court and that the verdict and judgment of the court should be affirmed.

Respectfully submitted,

FRANK R. JEFFREY,

United States Attorney,

H. SYLVESTER GARVIN,

Assistant United States Attorney.

United States
Circuit Court of Appeals
For the Ninth Circuit.

C. F. PETERSON,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the Territory of Alaska,
Third Division.

FILED

JAN 24 1924

F. D. MONOKTON,

CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

C. F. PETERSON,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the Territory of Alaska,
Third Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

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and His Assistants, H. G. McCAIN, of Cor-
dova, Alaska, and JULIEN A. HURLEY, of
Anchorage, Alaska,

Attorneys for Plaintiff and Defendant in
Error.

L. V. RAY, of Seward, Alaska,

Attorney for Defendant and Plaintiff in
Error. [1*]

In the District Court for the Territory of Alaska,
Third Division.

No. 874—CRIMINAL.

UNITED STATES OF AMERICA

vs.

C. F. PETERSON,

Defendant.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court.

You will please prepare, authenticate and certify
for filing in the office of the Clerk of the United
States Circuit Court of Appeals for the Ninth Cir-
cuit, at San Francisco, California, upon the writ of
error heretofore issued in the above-entitled cause,
the following papers, pleadings and records on file
in said case, to wit:

*Page-number appearing at foot of page of original certified Tran-
script of Record.

1. This praecipe.
2. Bill of exceptions.
3. Order settling and certifying bill of exceptions.
4. Assignment of errors.
5. Petition for writ of error.
6. Order allowing writ of error and fixing amount of bond, which shall act as a supersedeas.
7. Appearance bond upon writ of error (approved).
8. Cost bond upon writ of error (approved).
9. Writ of error.
10. Citation on writ of error (original).
11. Citation on writ of error (served copy).

Dated at Valdez, Alaska, this 2d day of November, 1923.

L. V. RAY,
Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Div. November 3, 1923.
W. N. Cuddy, Clerk. [2]

In the District Court for the Territory of Alaska,
Third Division.

No. 874—CRIMINAL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. F. PETERSON and CLINTON MAELHORN,
Defendants.

Notice of Presentation of Bill of Exceptions for Settlement and Certification.

To Honorable SHERMAN DUGGAN, United States Attorney for the Territory of Alaska, Third Division:

PLEASE TAKE NOTICE that the undersigned, as attorney for the defendants C. F. Peterson and Clinton Maelhorn, will on the 24th day of February, 1923, at the hour of ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, present to the Court for settlement and certification the defendants' bill of exceptions in the above-entitled case, a copy of which bill of exceptions is attached hereto and herewith served upon you.

Dated at Valdez, Alaska, this 17th day of February, 1923.

L. V. RAY,
Attorney for the Defendants.

Service of a true copy of the above notice of presentation of bill of exceptions for settlement and certification acknowledged this 19th day of February, 1923.

SHERMAN DUGGAN.
United States Attorney. [3]

In the District Court for the Territory of Alaska,
Third Division.

No. 874—CRIMINAL.

UNITED STATES OF AMERICA

vs.

C. F. PETERSON and CLINTON MAELHORN,
Defendants.

Bill of Exceptions.

Comes now C. F. Peterson, one of the above-named defendants, and being about to prosecute to the United States Circuit Court of Appeals for the Ninth Circuit, a writ of error upon the judgment made and entered by the above-named District Court on the 15th day of December, 1922, in said cause, as against the said defendant C. F. Peterson, prays an order of said District Court, or of the Honorable E. E. Ritchie, Judge thereof who presided at the trial of said cause and who made and entered said judgment aforesaid, that this bill of exceptions containing the following named papers, pleadings, proceedings, and exceptions in said cause, be filed, settled and certified to as said defendant's C. F. Peterson, bill of exceptions upon said writ of error, to wit:

1. Complaint.
2. Warrant.
3. Transcript docket entries Justice's court containing judgment and sentence therein.
4. Notice of appeal.

5. Undertaking on appeal.
6. Certificate of Justice.
7. Transcript of testimony and proceedings at trial.
8. Verdict.
9. Motion in arrest of judgment.
10. Minute order denying motion in arrest of judgment.
11. Judgment and sentence.
12. Bail bond pending writ of error.

True, full and correct copies of all of said papers, pleadings, proceedings and exceptions are hereto attached, and are, by reference herein, inserted in this bill of exceptions.

The defendant, C. F. Peterson, prays that the judgment and sentence of said District Court rendered and pronounced against him on December 15th, 1922, in said cause, may be reversed.

Dated at Seward, Alaska, this 17th day of February, 1922.

L. V. RAY,

Attorney for Defendant, C. F. Peterson. [4]

In the United States Commissioner's Court for
Knik Precinct, Third Division, Territory of
Alaska.

No. —.

UNITED STATES OF AMERICA

vs.

C. F. PETERSON and CLINTON MAELHORN,

Complaint for the Violation of Section 1, Act of Congress Approved February 14th, 1917, Known as the Alaska Dry Law.

(Filed August 12, 1922.)

C. F. Peterson and Clinton Maelhorn are accused by C. W. Mossman, Deputy United States Marshal for the Third Division of the Territory of Alaska, in this complaint of the crime of having intoxicating liquor in their possession, committed as follows.

The said C. F. Peterson and Clinton Maelhorn, on the 20th day of July, A. D. 1922, in Knik Precinct, in the Territory of Alaska and within the jurisdiction of this Court, then and there being, did then and there wilfully and unlawfully have in their possession intoxicating liquor, to wit, whiskey, commonly called "white mule," in violation of the provisions of the Act of Congress, approved February 14th, 1917, commonly known as the Alaska Dry Law, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States of America.

C. W. MOSSMAN.

United States of America,
Territory of Alaska,—ss.

I, C. W. Mossman, being first duly sworn, upon oath depose and say that the foregoing complaint is true; and that I am a Deputy United States Marshal for the Third Division of the Territory of Alaska.

C. W. MOSSMAN.

Subscribed and sworn to before me this 24th day of July, 1922.

[Seal]

W. H. RAGER,

U. S. Commissioner and *Ex-Officio* Justice of the Peace. [5]

In the United States Commissioner's Court for the Territory of Alaska, Third Division, at Anchorage.

United States of America,
Territory of Alaska,—ss.

Writ of Error.

Filed July 24, 1922.

The President of the United States of America to the Marshal of the Third Division of the Territory of Alaska, or His Deputy, GREETING:

We command you to apprehend forthwith *F. C. Peterson* and *Clinton Maelhorn* who is named in a complaint made an oath before me this 24th day of July, A. D. 1922, by *C. W. Mossman* if they be found in said district for the crime of having intoxicating liquor in their possession as is more particularly set forth in said complaint, and bring them before me to answer said complaint, and be further dealt with as the law directs.

HEREOF FAIL NOT and make return of this writ with your doings thereon.

Given under my hand and seal at Anchorage, this
24th day of July, 1922.

[Seal] W. H. RAGER,
United States Commissioner and *Ex-Officio* Justice
of the Peace. [6]

In Commissioner's Court.

Before W. H. RAGER, Commissioner and *Ex-Officio* Justice of the Peace.

No. 973.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

C. F. PETERSON and CLINTON MAELHORN,
Defendants.

JULIAN A. HURLEY, Attorney for Plaintiff.

JAMES TRUITT and L. V. RAY, Attorneys for
Defendant.

(Filed as of August 12, 1922.)

July 24, 1922. Complaint in writing verified by
C. W. Mossman charging above-
named defendant with crime of
having intoxicating liquor in his
possession—filed.

July 24, 1922. Warrant of arrest issued and de-
livered to the U. S. Marshal for
execution.

July 24, 1922. Marshal returned said warrant of
arrest endorsed as follows: "The

within writ came to hand July 24, 1922, and I executed same by arrest of the within named defendants and now produce them in Court.

H. P. SULLIVAN,
U. S. Marshal,
By C. W. Mossman,
Deputy."

July 24, 1922. Bail Bond as to defendant C. F. Peterson in sum of \$1000.00 with Fred Wright and P. O. Sundberg as sureties, approved and filed.

July 24, 1922. Bail Bond as to defendant Clinton Maelhorn in the sum of \$1000.00, with Fred Wright and P. O. Sundberg as sureties approved and filed.

July 31, 1922. Defendants in court—Complaint read to defendants, said defendants and each of them put in his plea of "not guilty" to said complaint.

July 31, 1922. By agreement case set for August 11, 1922, at 2:30 P. M.

Aug. 11, 1922. All parties present, including the above-named defendants: a jury having been expressly waived, cause being tried before the court without a jury. Request of L. V. Ray, Esq., attorney for defendants, for continuance, denied.

Witnesses for the Government sworn and testified, C. W. Mossman and Chas. Watson. After hearing the evidence in the case and argument of counsel and being fully advised the Court finds the said defendants C. F. Peterson and Clinton Maelhorn have been proven guilty of the Crime charged in the said complaint, and the Court adjudged said Defendants C. F. Peterson and Clinton Maelhorn, and each of said defendants guilty of the crime charged in said complaint, to wit: crime of having intoxicating liquor in their possession. Said defendants and each of them waiving time for pronouncing sentence and consenting that sentence be forthwith pronounced against said defendants, the Court rendered and entered Judgment of Conviction as follows: The above-named defendants C. F. Peterson, and Clinton Maelhorn, having been brought before me, W. H. Rager, a commissioner and *Ex-Officio* Justice of the Peace, in a criminal action for the crime of having intoxicating liquor in their possession, in violation of

Act of Congress approved February 14, 1917, and the said C. F. Peterson and the said Clinton Maelhorn having thereupon pleaded "Not guilty" and been duly tried by me and upon such trial duly convicted, I have adjudged that said C. F. Peterson be imprisoned in the Federal Jail at Anchorage, Alaska, for a period of Nine (9) months and and that he [7] pay a fine of Nine Hundred Dollars, and further that C. F. Peterson be imprisoned in the Federal Jail at Anchorage, Alaska, until such fine be satisfied; said imprisonment not to exceed one (1) day for every Two Dollars (2.00) of such fine; and that said C. F. Peterson serve one day for every two dollars of such fine of \$900.00 that he shall fail or refuse to pay and being in addition to said imprisonment of Nine (9) Months.

Further, I have adjudged that said Clinton Maelhorn be imprisoned in the Federal Jail at Anchorage, Alaska, for a period of Nine (9) months, and that he pay a fine of Nine Hundred Dollars (\$900.00), and further that

said defendant Clinton Maelhorn be imprisoned in the Federal Jail at Anchorage, Alaska, until such fine be satisfied, said imprisonment not to exceed One (1) day for every two Dollars (\$2.00) of such fine, and that said Clinton Maelhorn serve One Day for every two dollars that he shall fail or refuse to pay, and being in addition to said imprisonment of Nine (9) Months.

Done in open court this 11th day of August, 1922.

W. H. RAGER,

Commissioner and *Ex-Officio*
Justice of the Peace.

Aug. 15, 1922. Notice and undertaking on appeal sum of \$2000, sureties P. O. Sundberg, Z. J. Loussac as to C. F. Peterson, approved and filed.

Notice and undertaking on appeal sum of \$2000.00, sureties P. O. Sundberg and Z. J. Loussac as to defendant Clinton Maelhorn, approved and filed. [8]

In the Justice's Court for the Territory of Alaska,
Third Division, Knik Precinct, at Anchorage.

No. —.

UNITED STATES OF AMERICA, TERRI-
TORY OF ALASKA,

Plaintiff,

vs.

C. F. PETERSON and CLINTON MAELHORN,
Defendants.

Notice of Appeal.

To the UNITED STATES OF AMERICA, the
Plaintiff in the Above-entitled Action, and to
the United States District Attorney for Third
Judicial Division, Territory of Alaska, or Any
of His Assistants, and to J. A. HURLEY, As-
sistant United States District Attorney at An-
chorage, Alaska, and to the Hon. WILLIAM
H. RAGER, Justice of the Above-styled Court:

You and each of you will please take notice, that
C. F. Peterson, the defendant in the above-entitled
action, hereby appeals to the District Court for the
Territory of Alaska, Third Division, from the judg-
ment of conviction therein made and entered in
the Justice's Court for the Territory of Alaska,
Third Division, Knik Precinct, at Anchorage, be-
fore the Hon. William H. Rager, United States
Commissioner and *Ex-Officio* Justice of the Peace, on
Friday the 11th day of August, A. D. 1922, in favor
of the above-named plaintiff, United States of

America, and against the above-named defendant, C. F. Peterson, and from the whole thereof.

Said judgment of conviction by the Hon. William H. Rager being that the said defendant, C. F. Peterson, be confined and serve nine (9) months in the federal jail at Anchorage, Alaska, and also to pay a fine of Nine Hundred Dollars (\$900.00) and in lieu of and failure to pay such fine to serve one day for every Two Dollars of each fine until the same is satisfied for the crime of having intoxicating liquor in his possession at Anchorage, Alaska, on the 24th day of July, A. D. 1922, and being in violation of the Act known as "An Act to prohibit the manufacture or sale of alcoholic liquors in the Territory of Alaska and for other purposes" and approved February 14, 1917, said Act being commonly known as the Alaska Bone Dry Law; said defendant having been tried by the Court on the 11th day of August, 1922, and found defendant guilty as [9] charged. Said judgment hereby appealed from being in words and figures, to wit:

The above-named defendants C. F. Peterson and Clinton Maelhorn being brought before me, William H. Rager, a commissioner and *Ex-Officio* Justice of the Peace in a criminal action for the crime of having intoxicating liquor in his possession in violation of Act of Congress approved Feb. 14, 1917, and the said C. F. Peterson and Clinton Maelhorn having thereupon pleaded not guilty and been duly tried by me and upon such trial duly convicted I have adjudged that said defendant C. F. Peterson be imprisoned in the federal jail at Anchorage, Alaska,

for a period of nine (9) months and that he pay a fine of Nine Hundred Dollars (\$900.00) and further that the said defendant C. F. Peterson be imprisoned in the federal jail at Anchorage, Alaska, until such fine be satisfied said imprisonment not to exceed one (1) day for every Two (2) Dollars of such fine and that said C. F. Peterson serve one day for every Two Dollars of such fine of Nine Hundred Dollars (\$900.00) that he shall fail or refuse to pay and being in addition of said imprisonment of nine (9) months.

Further I have adjudged that said Clinton Maelhorn be imprisoned in the federal jail at Anchorage, Alaska, for a period of nine (9) months and that he pay a fine of Nine Hundred Dollars (\$900.00) and further that said defendant Clinton Maelhorn be imprisoned in the federal jail at Anchorage, Alaska, until such fine be satisfied, said imprisonment not to exceed one day for every Two Dollars (\$2.00) of such fine and that said Clinton Maelhorn serve one day for every two dollars of such fine of \$900.00 that he shall fail or refuse to pay and being in addition to said imprisonment of nine (9) months.

Done in open court this 11th day of August, 1922.

[Seal]

W. H. RAGER,

Commissioner and *Ex-Officio* Justice of the Peace.

[10]

Said judgment being entered in Criminal Docket No. 4 at page 170 in the above-styled court, and being Cause No. 973.

Said defendant C. F. Peterson, by order of the Court, having appeared for sentence on the 11th

day of August, 1922, was sentenced as above set out by the Hon. William H. Rager, the Justice above named and before whom the trial of the case was had.

This appeal is taken on questions of both law and fact.

Dated at Anchorage, Alaska, this 14th day of August, 1922.

(Signed) RAY and DAVID,
Attorneys for Defendant,
Anchorage, Alaska.

Service of the above and foregoing notice of appeal admitted and accepted, by true copy, this 14th day of August, 1922.

(Signed) SHERMAN DUGGAN.
U. S. District Attorney, Third Division, Territory
of Alaska.

By JULIEN A. HURLEY,
Assistant U. S. District Attorney, Third Division,
Territory of Alaska. [11]

In the Justice's Court for the Territory of Alaska,
Third Division, Knik Precinct, at Anchorage.

No. 973.

UNITED STATES OF AMERICA, TERRITORY
OF ALASKA,

Plaintiff,

vs.

C. F. PETERSON and CLINTON MAELHORN,
Defendants.

Undertaking on Appeal.

Filed August 15, 1922.

The above-entitled cause having been tried on the 11th day of August 1922, and the above-named defendant C. F. Peterson, having been found guilty as charged in the Justice's Court, Knik Precinct, Third Division, Territory of Alaska, at Anchorage, before Hon. Wm. H. Rager, Commissioner and *Ex-Officio* Justice of the Peace, and a judgment of conviction having been given on the 11th day of August 1922, by the Hon. Wm. Rager, the Justice of the above styled Court, whereby the above-named defendant, C. F. Peterson, was condemned to serve nine (9) months in the federal Jail at Anchorage, Alaska, and also to pay a fine of Nine Hundred Dollars (\$900.00) and in lieu of and failure to pay such fine to serve one day for every Two Dollars of such fine until the same is satisfied for the crime of having intoxicating liquor in his possession on the 24th day of July, 1922, and being in violation of the Act known as "An Act to prohibit the manufacture or sale of alcoholic liquors in the Territory of Alaska, and for other purposes" and approved February 14, 1917, said Act being commonly known as the Alaska Bone Dry Law, said judgment hereby appealed from being in words and figures to wit:

The above-named defendants C. F. Peterson and Clinton Maelhorn being brought before me, Wm. H. Rager, a Commissioner and *Ex-Officio* Justice of the Peace, in a criminal action for the crime of having intoxicating liquor in his possession in violation

of Act of Congress approved Feb. 14, 1917 and the said C. F. Peterson [12] and Clinton Maelhorn having thereupon pleaded not guilty and been duly tried by me and upon such trial duly convicted, I have ordered and adjudged that said defendant C. F. Peterson be imprisoned in a federal jail at Anchorage, Alaska, for a period of nine (9) months and that he pay a fine of Nine Hundred Dollars (\$900.00) and further that the said defendant C. F. Peterson be imprisoned in the federal jail at Anchorage, Alaska, until such fine be satisfied, said imprisonment not to exceed one day for every Two Dollars of such fine and that said C. F. Peterson serve one day for every Two Dollars of such fine of Nine Hundred Dollars (\$900.00) that he shall fail or refuse to pay and being in addition of said imprisonment of nine months.

Further, I have adjudged that said Clinton Maelhorn be imprisoned in the federal jail at Anchorage, Alaska, for a period of nine months and that he pay a fine of Nine Hundred Dollars (\$900.00) and further that said defendant Clinton Maelhorn be imprisoned in the federal jail at Anchorage, Alaska, until such fine be satisfied, said imprisonment not to exceed one day for every Two Dollars (\$2.00) of said fine and that said Clinton Maelhorn serve one day for every two dollars of such fine of \$900.00 that he shall fail or refuse to pay and being in addition to said imprisonment of nine (9) months.

Done in open court this 11th day of August, 1922.

W. H. RAGER,

Commissioner and *Ex-Officio* Justice of the Peace.

Said judgment being entered in Criminal Docket No. 4 at page 170 in the above-styled court, and being Cause No. 973.

Said defendant having appealed from said judgment rendered in the Justice's Court, Knik Precinct, Third Division, Territory of Alaska, before Hon. Wm. H. Rager, Commissioner and *Ex-Officio* Justice of the Peace, to the District Court for the Territory of Alaska, Third Division; and said C. F. Peterson, the above-named defendant having been admitted to bail in the sum of Two Thousand Dollars (\$2000.00). [13]

NOW, THEREFORE, I, C. F. Peterson, as principal, and Z. J. Loussac, a resident of Anchorage, Alaska, by occupation a druggist, and P. O. Sundberg, a resident of Anchorage, Alaska, by occupation a merchant, as sureties, do hereby undertake that the above-named defendant C. F. Peterson, shall in all respects abide and perform the orders and judgments of the Appellate Court upon appeal, or if he fails so to do in any particular, that we will pay to the United States the sum of Two Thousand Dollars (\$2000.00).

We further undertake that the appellant will also pay to the United States all costs and disbursements that may be awarded against him on appeal.

Dated and sealed at Anchorage, Alaska, this 15th day of August, 1922.

C. F. PETERSON, (Seal)
Principal.

P. O. SUNDBERG, (Seal)
Surety.

Z. J. LOUSSAC, (Seal)
Surety.

United States of America,
Territory of Alaska,—ss.

Z. J. Loussac and P. O. Sundberg, as sureties named in the foregoing undertaking, being first duly sworn, each for himself and not one for the other deposes and says that he signed the foregoing instrument and undertaking; that he is a resident of the Territory of Alaska, that he is not a counselor or attorney at law, marshal, clerk of the Court or other official of any Court; that he is worth the sum specified in the undertaking exclusive of property exempt from execution, over and above all his just debts and liabilities.

P. O. SUNDBERG.

Z. J. LOUSSAC. [14]

Subscribed and sworn to before me this 15th day of August, 1922.

W. H. RAGER,
Commissioner and *Ex-Officio* Justice of the Peace,
Knik Precinct, at Anchorage.

Taken and acknowledged before me and approved this 15th day of August, 1922.

[Seal]

W. H. RAGER,
Commissioner and *Ex-Officio* Justice of the Peace,
Knik Precinct, at Anchorage. [15]

In Commissioner's Court, Third Division, Territory of Alaska at Anchorage.

Before W. H. RAGER, Commissioner and *Ex-Officio* Justice of the Peace.

No. 973.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. F. PETERSON and CLINTON MAELHORN,
Defendants.

Certificate of Justice.

I HEREBY CERTIFY that the attached consisting of two (2) pages is a true and correct transcript of my docket, and contains a copy of all the material entries *my* my docket relating to said cause and appeal, and is a copy of my docket in the above-entitled action.

I also certify that the annexed and accompanying papers are all the original papers relating to said cause and appeal and filed with me and being all the papers and pleadings filed in said cause as well as the notice of appeal and undertaking on appeal filed herein:

And for the purpose of identification I FURTHER CERTIFY that said attached papers in said cause and appeal are numbered (in ink) from 1 to 8, both inclusive.

Dated and signed at Anchorage, Alaska, this 16th day of August, A. D., 1922.

[Seal]

W. H. RAGER,
Commissioner and *Ex-Officio* Justice of the Peace,
Knik Precinct, at Anchorage.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Aug. 22, 1922. W. N. Cuddy, Clerk. By Robt. S. Brograw, Deputy.
[16]

In the District Court for the Territory of Alaska,
Third Division.

No. 874—CRIMINAL.

UNITED STATES OF AMERICA

vs.

C. F. PETERSON and CLINTON MAELHORN,
Defendants.

Transcript of Evidence.

BE IT REMEMBERED, That the above-entitled cause came on duly and regularly to be heard on Tuesday, the fifth day of December, 1922, at Anchorage, in said Territory and Division, before the Honorable E. E. RITCHIE, Judge of said Court, and a jury:

The Government was represented by Julien Hurley and Harry G. McCain, Assistant United States Attorneys:

The defendants were represented by their attorneys and counsel, L. V. Ray, Esq., and Leopold David, Esq.

A jury having been empanelled, opening statements were made by Mr. Hurley on behalf of the Government, and by Mr. Ray on behalf of the defendants.

WHEREUPON the following proceedings were had and done, to wit: [17]

Mr. RAY.—There has also been filed in this case a motion for continuance and change of venue with which by reference the affidavits in the other Peterson case, #881 criminal, are made a part.

The COURT.—The motion is denied. Defendants allowed an exception.

In the course of the examination of the jury, counsel for defendants made the following statement:

Mr. RAY.—The defendants at this time renew the motion heretofore made for a change of venue and continuance of this case on the ground of inability to secure jurors who are without opinion or prejudice; further, that a general opinion or prejudice existing in the community is shown by the examination of some forty-five jurors which fact would tend to reflect itself in the jury room and in any verdict returned into court at this term of court.

The COURT.—Motion denied. Exception allowed.

Mr. RAY.—The defendants call the attention of the Court to the fact that this is an appeal case in which bonds covering cost of appeal have been required of defendants; and that the excessive cost of further action in this case in the event he is here found guilty is such as to deny to the defend-

ants their constitutional rights with reference to a fair and impartial trial, and penalizes him in the prosecution of his appeal. I would further call the Court's attention to the absolute inequality of the defendants upon appeal as against the government.

The COURT.—Why, Mr. Ray, as I understand the law governing the request of the defendants for a change of venue, it is not enough for them to show that there is a good deal of hostility to them in the community, but there must be a showing that the general hostility of the community to them is such as might influence a jury against them after being empanelled, as in the [18] Frank case in Georgia where the defendant was, without a doubt, convicted by the crowd inside and outside the courtroom; or the sentiment must be so strong that it would be almost impossible to get a fair jury from the body of the community. I was not satisfied when I denied the motion before that this is true in this case and I am no more satisfied now, because the jurors who have been called here and disqualified so numerous has satisfied me that my judgment at that time was correct. The jurors are generally honest in their statements and do not hesitate to say so and disqualify when they have a prejudice or opinion. A great many jurors here who didn't feel sure they could be impartial have said so and disqualified. This is a large community and while I am disappointed that a jury has not been secured from the number of jurors drawn, I am still satisfied that a jury can be obtained. I do not believe now that it would be well to adjourn this case.

Under certain circumstances a court is justified in adjourning a case but I am not sure if to adjourn this case now wouldn't amount to a mistrial and probably raise the question of jeopardy. Jeopardy, by the great weight of authority, commences when the jury is sworn, but a Court should not discharge a jury without some substantial reason.

I am mindful of the fact that there has been a very considerable showing made that there is hostility to the defendant in this community. Because of that fact I have required the names of the special venire to be drawn from the box, and, without any reflection on the marshal's office, I do not care to have any jurors summoned by the marshal or his deputies to sit in this case. In order to avoid any possibility that it might appear advantage is being taken by the Government in empanelling this jury I have required against, for the second time, that the names be drawn from the box. Your motion for a change of venue is denied. Defendants allowed an exception. [19]

Testimony of C. W. Mossman, for the Government.

C. W. MOSSMAN, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination:

(By Mr. HURLEY.)

Q. What is your name? A. C. W. Mossman.

Q. What official position, if any, do you hold in Anchorage? A. Deputy U. S. Marshal.

Q. For what division? A. The third.

(Testimony of C. W. Mossman.)

Q. Were you acting as deputy United States marshal on the 20th day of July, 1922.

A. I was.

Mr. RAY.—The defendants object to the introduction of the testimony of the witness for the following reasons:

1. The complaint on which the defendants are sought to be placed on trial is signed "C. W. Mossman" not in any official capacity. An indictment to be good would have to be signed "Sherman Duggan, United States Attorney."

2. The Court is without jurisdiction to try these defendants in that it is in violation of the rights of the defendants as given by the fifth amendment of the Constitution of the United States providing that no person shall be held to answer for a capital or otherwise infamous crime unless by indictment of a grand jury.

3. That the Congress of the United States is without authority to pass legislation making the possession of intoxicating liquor an offense.

4. That the offense sought to be charged in this complaint is not set forth with sufficient certainty to apprise these defendants to which charge they must answer, and the complaint [20] does not state sufficient facts in law to constitute a valid complaint.

The COURT.—The objection is overruled. Defendants allowed an exception.

Mr. HURLEY.—Now, Mr. Mossman, will you go ahead and state what time of the day it was, on the

(Testimony of C. W. Mossman.)

20th day of July this year, that you saw the defendants Chauncey Peterson and Mr. Maelhorn, if you did see them?

A. Between two and three o'clock in the afternoon of July 20th.

Q. Who was with you?

A. Mr. Watson, Mr. Green and Cadawallader, the driver of the car which we hired.

Q. Under what circumstances did you meet the defendants?

A. Proceeding to the southern limits of the town at Ninth Street and "N" we left the town and went across an uncultivated portion of the country out there—it is clear as to trees but not stumps—in the direction of Chester Creek in Knik Arm outside the town about a mile, and proceeding out that road we got to a point about a hundred yards from where the railroad track crosses the road and intercepted the defendants in a car coming toward town, and we were going from town.

Q. That was in Knik precinct, in Alaska?

A. Yes, sir.

Q. Just go ahead and state what was done there when you met the defendants at that time?

Mr. RAY.—At the time you intercepted the defendants as you stated in the car had you a search-warrant?

Mr. HURLEY.—We object to the question, if the Court please, as incompetent.

The COURT.—Objection overruled.

(Testimony of C. W. Mossman.)

The WITNESS.—I had no search-warrant, no, sir. [21]

Mr. RAY.—Have any other process of any kind?

The WITNESS.—No, sir.

Mr. RAY.—The defendants object to the further introduction of the testimony of this witness and any evidence obtained by him as the same was procured in violation of the fourth and fifth amendments to the Constitution of the United States providing that there shall be no illegal and unreasonable searches and seizures, and that a defendant shall not be compelled to give incriminating testimony or further incriminating testimony against himself.

The COURT.—The objection is overruled. Exception allowed.

Mr. HURLEY.—Now, go ahead Mr. Mossman and state what transpired out there at the point where you and Judge Green and Mr. Watson met the defendants.

A. Well, we were proceeding in our car in the direction I have indicated on this road which is nothing but a trail so far as any work has been done on it. It is impossible to pass at any place and we ran up into the car; up immediately in front of the car occupied by these two defendants. They had just come over the hill and they were out of our sight a moment before we met them. We were coming down on this side of the little hill when we got to them. I got out of our car and went to the car occupied by the defendants and recognized

(Testimony of C. W. Mossman.)

both defendants. I said to the defendant Peterson, "What have you got, Chauncey?" and he said, "I have a load." His car had the storm curtains on the sides but I could see it was filled with some product behind, that is the whole space between the front and rear seat, with what I soon discovered to be barrels. [22]

Q. Who was driving the car?

A. The defendant Peterson.

Q. And whose car was it?

Mr. RAY.—We object to the question as calling for a conclusion of the witness.

The COURT.—He may answer if he knows. The objection is overruled. Exception allowed.

A. It is the defendant Peterson's car.

Q. Do you know what kind of a car it is?

A. A Buick seven-passenger touring car.

Q. When you saw the barrels or kegs in the car what did you do?

Mr. RAY.—We object to the question as something not yet in evidence.

The COURT.—The objection is overruled. Exception allowed.

A. I moved our car to one side and climbed into their car on top of these kegs or barrels and drove into town with the two defendants.

Q. And were the other officers there at the time?

A. They were there at the time myself and the two defendants came into town; they didn't ride into town.

Q. How did they come into town?

(Testimony of C. W. Mossman.)

Mr. RAY.—Object to the question.

The COURT.—Objection overruled. Exception allowed.

A. I directed them to continue down to the creek.

Mr. RAY.—We object to the answer as not responsive and ask that it be stricken.

The COURT.—The answer will be stricken.

Q. How did they get back to town.

A. They were walking when I left them.

Q. In what direction? [23]

Mr. RAY.—We object to that.

The COURT.—The objection is overruled. Exception allowed.

A. They continued on down this road around which the defendants had come and proceeded in the direction of Chester Creek.

Q. And you and the two defendants did what then? A. We came into town.

Q. What did you do with the car and the barrels that you found in the car, if anything?

A. We put the car in a shed in the rear of the office and put the barrels in a room next to my office.

Q. Did you examine the contents of the barrels that you found there in the defendant's car that day? A. I did. •

Q. What did they contain?

A. A locally manufactured whisky called white mule.

Q. Is that an intoxicating liquor? A. Yes, sir.

(Testimony of C. W. Mossman.)

Q. Did you take possession of the barrels and contents? A. Yes, sir.

Q. Can you produce them? A. Yes, sir.

Q. How much liquor did the defendants have in the car at the time?

A. Ninety-five gallons contained in eight ten-gallon kegs and three five-gallon kegs.

Q. And are these the kegs that you have just brought into the courtroom the contents that you took from the car of the defendants?

A. Yes, sir.

Q. I believe you stated that you examined the contents of some of these barrels?

A. Yes, sir. [24]

Q. Is there any of them that can be opened at the present time? A. I think so.

Q. And is the contents of this bowl that you have poured from this keg part of the liquor that you found in the car on that day?

Mr. RAY.—We object to the question. The liquor is not yet in evidence; and we object to the conduct of the prosecuting officer in thus making an attempt to introduce certain testimony before the Court has formally passed upon and admitted such testimony.

Mr. HURLEY.—We will withdraw the question.

The COURT.—I think it was an oversight.

Q. I wish at this time to offer the—

Mr. RAY.—We except to the statement of the Court as not being sufficient under the circum-

(Testimony of C. W. Mossman.)

stances which have arisen to correct the error; and we object to the introduction of the kegs and contents for the reason that it is apparent on the testimony of the officer that he acted without process of any kind.

The COURT.—The objection is overruled. Exception allowed.

Mr. HURLEY.—We now offer in evidence the barrels and contents.

The COURT.—They will be admitted.

The barrels and contents admitted in evidence and marked Plaintiff's Exhibits "A" to "K" inclusive.

Q. I will hand you this bowl and its contents and ask you to state what it is and where you got it?

A. It is whisky, commonly called white mule, and I took it from one of the kegs taken from the defendants Peterson and Maelhorn.

Q. Is that one of the kegs we marked as an exhibit? A. Yes, that is Exhibit "A."

Q. That keg that you took the liquor from, that is in the bowl is marked Exhibit "A."

A. Yes, sir. [25]

Q. Where have these kegs and the contents of these barrels that have been introduced in evidence been since you took them from the defendants?

A. They have been in my possession.

Q. Have the contents of these barrels been changed or tampered with?

(Testimony of C. W. Mossman.)

A. No, except that one of the ten-gallon kegs has been leaking and is not now full.

Q. Has there been any other change except as you have stated in regard to one barrel?

A. No, sir.

Q. Did you state on what day this was?

A. July 20, 1922.

Mr. HURLEY.—I want to offer this bowl and its contents in evidence, taken from Exhibit “A.”

Mr. RAY.—Objection on the same grounds. It was an unlawful seizure. Defendant also objects to the jurors acting as witnesses in that certain liquid has been circulated among them by the assistant United States attorney.

The COURT.—The objection will be overruled. The bowl will be admitted in evidence and marked. Exception allowed.

The bowl admitted in evidence as Plaintiff’s Exhibit “L.”

Mr. HURLEY.—That is all.

Mr. RAY.—The defendants move to strike the testimony of the witness Mossman as to any fact testified by him on the ground that the said officer acted without process of law, either a search-warrant or warrant of arrest for these defendants, in violation of the constitutional rights provided in the fourth and fifth amendments to the Constitution of the United States, and was in effect an illegal search and illegal seizure.

The COURT.—The motion is denied. Exception allowed.

Mr. RAY.—We have no cross-examination. [26]

Testimony of Charles A. Watson, for the Government.

CHARLES A. WATSON, a witness called and sworn in behalf of the Government, testified as follows:

Direct Examination.

(By Mr. HURLEY.)

Q. What official position do you hold in the territory of Alaska?

A. Deputy United States Marshal, third division.

Q. Were you a deputy United States Marshal on the 20th day of July, 1922? A. Yes, sir.

Q. Where were you on the afternoon of the 20th day of July, 1922, between the hours of two and three o'clock in the afternoon?

A. I was out on the brick-yard road.

Q. Who were you with at that time?

A. Cadwalladar was driving the car I was in with Mr. Mossman and Judge Green.

Q. Did you see the defendants, or either of them on that afternoon? A. Yes, sir.

Q. Whereabouts?

A. On the brick-yard road about 100 yards from the track.

Q. What were they doing?

A. They were in the car, driving it.

Q. Anybody else in the car with them?

A. No, sir.

Q. Who was driving the car?

A. The defendant Peterson.

(Testimony of Charles A. Watson.)

Q. And what did you do when you saw the defendants out there?

A. Well, the cars came facing one another and pretty close. We were just over a little knoll or bend and Mr. Mossman and Judge Green and I got out and went to their car. [27]

Mr. RAY.—Did you have a search-warrant?

A. No, sir.

Mr. RAY.—Any other warrant? A. No, sir.

Mr. RAY.—We object to the introduction of testimony of this witness now sought to be elicited on the ground that the same is in violation of the rights of the defendant as prescribed in the fourth and fifth amendments to the Constitution of the United States.

The COURT.—The objection is overruled. Exception allowed.

Q. Go ahead and just state what you did there.

A. We went over to his car and saw the barrels and booze in there. Mossman went in the car and Green and I went down to the beach.

Q. Did you see what was in the car at that time?

A. Yes, sir.

Q. I call your attention to Exhibits "A" to "K" that have been introduced—the barrels here—and ask you to state what they are, if you know?

A. Yes, they are eight ten-gallon and three five-gallon barrels of white mule.

Q. And you have examined the contents of these barrels? A. Yes, sir.

Q. Where did you first see them?

(Testimony of Charles A. Watson.)

A. In Chauncey Peterson's car.

Q. On the afternoon of the 20th day of July, 1922? A. Yes, sir.

Q. Do you know in what precinct you saw the liquor first?

A. The south side of the city limits in Knik precinct. [28]

Q. In Knik precinct?

A. Yes, sir, in Knik precinct.

Q. Do you know whether or not the contents of these barrels that have been introduced in evidence is intoxicating liquor? A. Yes, sir.

Q. Is it? A. Yes, sir.

Q. What is it commonly called?

A. White mule.

Q. Did you hear any conversation of the defendants at that time?

A. Mossman said something: I couldn't tell what it was and I didn't hear the answer.

Q. Did you notice the defendant Maelhorn—where he was in the car?

A. He was sitting aside Peterson in the front seat.

Q. What time of the day was this?

A. I think it was about half past two or three o'clock.

Q. Who was driving the defendant's car?

A. Mr. Peterson.

Q. You know that, do you—how do you know?

A. He was at the front seat at the wheel?

Q. Did you recognize the car? A. Yes, sir.

(Testimony of Charles A. Watson.)

Q. Do you know whose car it was? A. Yes, sir.

Q. Whose? A. Mr. Peterson's.

Mr. HURLEY.—That is all.

Mr. RAY.—Defendants move to strike the testimony of the witness Watson on the ground that the testimony thus given is based upon a search without warrant of arrest or search-warrant in contravention of the rights of the defendant established by the fourth and fifth amendments to the Constitution of the United States. [29]

The COURT.—The motion is denied. Exception allowed.

Cross-examination.

(By Mr. RAY.)

Q. Is this car a left-hand or right-hand drive.

A. Left hand.

Q. Was Chauncey on the left-hand side from you?

A. Left hand.

Q. Sure about it?

A. Yes, he was on the left-hand side of the car.

Mr. RAY.—That is all.

Witness excused.

**Testimony of C. W. Mossman, for the Government
(Recalled).**

C. W. MOSSMAN, recalled for further examination, testified as follows:

(By Mr. HURLEY.)

Q. I believe you stated in your testimony that you came in with the defendants after you met

(Testimony of C. W. Mossman.)

them there on this road on the afternoon of the 20th day of July, this year; is that correct?

A. Yes, sir.

Q. Did either of the defendants have any conversation with you while you were coming in?

A. Yes, sir.

Q. Did the defendants, or either of them, make any voluntary statements to you? A. Yes, sir.

Q. Who? A. Mr. Maelhorn. [30]

Q. What did he say?

Mr. RAY.—Were these men under arrest at the time they talked?

A. Yes, I would say so; I would say that they and myself understood what the situation was.

Q. Well, were these men under arrest at that time? A. Yes.

Q. And you say you had a conversation with Maelhorn, or he made some statement?

A. Yes, sir.

Q. Did you caution him as to his rights in any way? A. No, sir.

Q. Did you say to him that what he might state to you you would have to use as an officer against him? A. No, sir.

Q. Did you have him handcuffed? A. No, sir.

Mr. HURLEY.—Did you seek to elicit any information from either of the defendants by questioning them or anything?

The WITNESS.—No, sir.

Mr. HURLEY.—Were these statements made voluntarily without anything on your part?

(Testimony of C. W. Mossman.)

The WITNESS.—Yes, sir.

Mr. RAY.—Did you ask these men any questions?

A. I don't recall asking any questions.

Q. You are quite sure that you didn't first ask some questions about what they were doing?

A. The only question I asked was when we first approached the car: I said, "What have you got there?" and he said, "I have a load."

Q. How long a drive is it from there to the federal jail?

A. Ten minutes at the most, depending on the speed used. [31]

Q. They were under arrest during this ten minute interval; during the time it took to come from the place you intercepted them? A. Yes, sir.

Q. During that time you asked no questions?

A. No, sir.

Mr. RAY.—Well, we object to the introduction of any statements made by the defendants while under arrest.

The COURT.—The objection is overruled. Exception allowed.

Mr. HURLEY.—What statement did Mr. Maelhorn make to you?

A. He rather jocularly remarked that people who played with fire got burnt.

Q. Any other statement? A. No, sir.

Mr. HURLEY.—That is all.

Cross-examination.

(By Mr. RAY.)

Q. You don't know where that quotation comes from, do you?

(Testimony of C. W. Mossman.)

Mr. DUGGAN.—Object to the question; that's nonsense.

The COURT.—The objection is sustained.

Q. Have you ever heard that quotation before?

A. Many times.

Q. Do you frequently use it?

A. It is in my vocabulary; it is a common quotation.

Q. Are you sure you didn't ask him any questions? A. I am not sure.

Q. You didn't even talk about the weather?

A. We're well acquainted. There was no reason why we shouldn't talk then as well as any other time.

Q. And he made the remark stated?

A. Yes, sir.

Mr. RAY.—That is all.

Witness excused. [32]

Testimony of J. L. Green, for the Government.

J. L. GREEN, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HURLEY.)

Q. Were you a special deputy United States marshal on the 20th day of July, this year?

A. I am not sure whether I received my appointment just before that or just after, but I was a special agent for the suppression of the liquor

(Testimony of J. L. Green.)

traffic among the Indians and among my duties I had to look after—

Mr. RAY.—We object to the answer as not responsive.

The COURT.—The objection is sustained; that is the objection to the last part of the answer.

Q. Did you see the defendants on the 20th day of July, 1922? A. Yes, sir, I did.

Q. About what time did you first see them?

A. I should judge between two and three o'clock.

Q. Who was with you?

A. Mr. Mossman, Mr. Watson and Mr. Cadwallader.

Q. Where did you see the defendant?

A. When we first saw the car we were just going down the first hill—we saw the top of the car. I first saw the defendants when we came up the hill near the railroad track. We were going up on one side and Chauncey's car was on the other and when we came to the top we met, and we saw Chauncey then.

Q. Did both cars stop? A. Yes, sir.

Q. Did you recognize the car you met?

A. Yes, sir.

Q. Do you know whose car it was?

A. Mr. Peterson's. [33]

Q. Was there anybody in the car?

A. Yes, Peterson and I think it was a man looked like this other gentleman. He was dressed differently and it was the first time I ever saw him.

Q. You are not acquainted with Mr. Maelhorn?

(Testimony of J. L. Green.)

A. No, sir.

Q. Who was driving the car?

A. Mr. Peterson.

Q. After the car stopped what did you do?

A. I looked into this car and saw there were some kegs.

Mr. RAY.—Had you a warrant?

The WITNESS.—No, sir.

Mr. RAY.—Are you sure you were a deputy United States marshal on this day?

The WITNESS.—I am not sure that I was a deputy United States marshal, but I filled the other position.

Mr. RAY.—Had you a search-warrant to search an automobile?

The WITNESS.—No, sir.

Mr. RAY.—Defendants object to the introduction of the testimony sought to be elicited from this witness on the ground that it was obtained without authority in law and in violation of the rights of these defendants as established by the fourth and fifth amendments to the Constitution of the United States.

The COURT.—The objection is overruled. Exception allowed.

Q. Go ahead and state just what you did there?

A. I looked in the car and saw the kegs; however, I didn't count them at that time. And then Mr. Mossman got in the car and told Mr. Peterson to drive on up to the jail and they went on; and then Mr. Watson and I sent back the car we were in;

(Testimony of J. L. Green.)

then I didn't see any more of the defendants till we got back up to the jail. [34]

Q. Did you examine these barrels which have been introduced here in evidence?

A. I examined and counted them after they got up to the marshal's office but I have never tasted the contents of any of these barrels.

Q. I will hand you this bowl and its contents which have been introduced in evidence as Plaintiff's Exhibit "L," and ask you to examine the contents of this bowl. Do you know what that bowl contains? A. Yes, sir.

Q. State what it contains? A. White mule.

Q. Is that an intoxicating liquor?

A. Yes, a crude form of whiskey or alcohol.

Mr. HURLEY.—That is all.

Mr. RAY.—I ask that the witness Green's testimony be stricken on the ground that the same is based on a seizure without search-warrant in contravention to the rights guaranteed to these defendants by the fourth and fifth amendments to the Constitution of the United States.

The COURT.—The motion is denied. Exception allowed.

Cross-examination.

(By Mr. RAY.)

Q. When you saw these kegs was there anything over them in the automobile?

A. I didn't notice anything over them at that time. Mossman went first and opened up the side curtains; it was a closed car, it had curtains. Then

(Testimony of J. L. Green.)

I got out and Watson got out and I went around and looked and saw the kegs in the condition they are in now. [35]

Q. There was nothing over them?

A. I don't remember seeing anything over them. There may have been and thrown back, I don't know.

Q. You say it was a closed car? A. Yes, sir.

Q. You mean it had side curtains? A. Yes.

Q. Not wooden side curtains? A. No, sir.

Q. And what day was this?

A. My recollection is that it was on the 20th day of July.

Q. Do you know what day of the week it was?

A. No, sir; I don't.

Q. What is this title you might have held on this day: what kind of an officer?

A. Special officer for the suppression of liquor among the Indians.

Q. Employed by the Department of Interior?

A. Yes, sir.

Q. Not employed by the Department of Justice?

A. No, only as I had received my employment as a special deputy marshal.

Q. You say you have not examined the contents of these barrels? A. No, sir.

Q. Were there gunny-sacks on these barrels when you first saw them? A. Yes, sir.

Mr. RAY.—That is all.

Witness excused. [36]

Testimony of C. L. Cadwallader, for the Government.

C. L. CADWALLADER, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HURLEY.)

Q. Where do you reside? A. In Anchorage.

Q. Were you residing here on the 20 day of July, this year? A. I was.

Q. What business were you engaged in at that time? A. In the taxi business, car business.

Q. Did you see Mr. Mossman, Judge Green and Mr. Watson that afternoon of the 20th?

A. I don't recall the date but it was around that time when I was called by Mr. Mossman.

Q. And what did he call you for?

A. I don't know; he said to come down and I went to his office.

Q. Did you see either of the defendants that afternoon that the officers had you come to the office? A. I did.

Q. And what were you doing at the time you first saw them? A. I was driving.

Q. What car? A. My own.

Q. Who was with you?

A. Charley Watson, Judge Green and Mr. Mossman.

Q. How did they happen to be with you at that time?

(Testimony of C. L. Cadwallader.)

Mr. RAY.—Object to the question.

The COURT.—Objection overruled. Exception allowed.

A. They called me for service and I rendered it.

Q. They employed you at that time?

A. They did. [37]

Q. Whose car was this you were driving?

A. My own car.

Q. And as I understand it you were driving your car on that afternoon—

Mr. RAY.—We object to the question.

The COURT.—The objection is overruled. Exception allowed.

Q. Where were you when you first saw the defendants that afternoon?

A. You mean what road?

Q. Yes.

A. We were out on this road that runs to the mouth of Chester Creek known as the old brick-yard road.

Q. And what were the defendants doing when you first saw them?

A. They were in the seats of their car.

Q. Did you recognize the car they were in?

A. Yes, sir; I recognized the car.

Q. Did you know whose car it was?

A. Well, it was supposed to be Chauncey's, that's all I know.

Q. Who was driving the car?

A. Chauncey was at the wheel.

Q. And did you stop your car? A. I did.

(Testimony of C. L. Cadwallader.)

Q. What did the officers who were with you do then? A. They got out from the car.

Q. And what did Mr. Mossman do?

A. He went to Chauncey's car and got in.

Q. And then what?

A. They passed me and I didn't come up; I came up afterwards.

Q. Who came up?

A. Nobody; I came back alone.

Q. Did you examine anything in Mr. Peterson's car at that time? A. I did not. [38]

Q. You were just driving where the officers told you to go? A. Yes, sir.

Mr. HURLEY.—That is all.

Cross-examination.

(By Mr. RAY.)

Q. You have been down to Chester Creek before?

A. Yes, sir.

Q. Is there room for two cars to pass there?

A. Two cars can pass along most of the road; some of it they can't pass.

Q. Well, this particular place where you intercepted the car where Mr. Peterson was: was there room to pass?

A. When I stopped the car there was.

Q. Well, did you stop in front of him to impede his progress? A. No, sir; not intentionally.

Q. Under the direction of the officers?

A. No, sir.

Q. Well, could he have gone out around you?

A. Not at this particular place I don't think he

(Testimony of C. L. Cadwallader.)

could have gone around without running into the stumps.

Q. It's just an ordinary trail that can be used by automobiles? A. Just a single track wood road.

Mr. RAY.—That is all.

Witness excused.

The Government rests. [39]

DEFENSE.

Testimony of Clinton Maelhorn, for Defendants.

CLINTON MAELHORN, one of the defendants, sworn as a witness in his own behalf, and in behalf of his codefendant C. F. Peterson, testified as follows:

Direct Examination.

(By Mr. RAY.)

Q. What is your name? A. Clinton Maelhorn.

Q. You are one of the defendants?

A. Yes, sir.

Q. How long have you been in Alaska?

A. I have been in Alaska on and off for seven or eight years.

Q. What is your occupation?

A. Now I am driving a car for Peterson.

Q. Working for wages? A. Yes, sir.

Q. On the 20th day of July, this year, what occupation had you?

A. I was working for him at that time.

Q. Before coming to Alaska had you been engaged in any business other than the automobile business?

(Testimony of Clinton Maelhorn.)

A. This is the first time I have ever been in Alaska.

Q. Have you been in any other part of the north?

A. Been inside.

Q. What business were you in there?

A. Gasboating on the lower Yukon.

Q. Ever engaged in mining?

A. I was prospecting three winters.

Q. What is your native state?

A. Illinois. [40]

Q. You had an automobile stage line in Oregon?

A. In Salem, Oregon, yes, sir.

Q. Will you come down to the date of July 20th and state to the jury what transpired with reference to a call for you?

A. Well, I was over to the garage—there was no call at all—and I went over to get an extra tire and he had a vulcanizing plant there. When I got there he hadn't a tube fixed and he said, "You will have to run on that—we are vulcanizing this afternoon." He asked me if I wanted to haul a load from the beach and I told him I did, yes; so in going down with the car the tire went flat and I drove the car to one side and telephoned to Chauncey to bring me another car. He brought me another car down there after I telephoned from the house and I walked around on "L" or "M" Street and walked around the block. Then I loaded this load and started back when I met the officers.

Q. Was that liquor ever in your possession?

A. It was in the car.

(Testimony of Clinton Maelhorn.)

Q. And you were working for Peterson?

A. Yes, sir.

Q. You heard what Mr. Mossman said with reference to some statement made by you: Do you recall making any such statement to Clarence Mossman?

A. I remember talking to him all the way; I don't remember making that particular statement. I may have but I can't recall it.

Mr. RAY.—That is all.

Cross-examination.

(By Mr. HURLEY.)

Q. Who loaded this liquor into the car?

A. Chauncey Peterson did. [41]

Q. And where was he when he loaded it into the car?

A. On the beach at the mouth of Chester Creek.

Q. And who was this man that told you about this load?

A. Billy Hunt. He said there was \$50 in it if I would drive it into the garage.

Q. He didn't tell you whose it was? A. No.

Q. And he sent you after it? A. Yes, sir.

Q. Was there anybody in possession of this liquor when you went to the beach?

A. No, sir. I started down at first alone with the Buick car.

Q. And you don't know who landed it there?

A. No, I don't.

Mr. RAY.—Was it your liquor? A. No, sir.

Q. Was it Mr. Peterson's? A. No, sir.

(Testimony of Clinton Maelhorn.)

Q. You are in the taxi business?

A. I am working for Mr. Peterson.

Q. Do you know whether he has a license for a taxi business?

Mr. HURLEY.—We object to the question as immaterial.

The COURT.—The objection is sustained. Exception allowed.

Mr. RAY.—That is all.

Defendant rests.

Government rests.

Mr. RAY.—Defendants now move the Court for a directed verdict of not guilty on the ground that the testimony introduced is not sufficient in law to justify or warrant the conviction of the defendants or either of them; further, that such testimony [42] was elicited and by the Court permitted to be introduced in evidence over and against the objections of the defendants, and each of them, in that such testimony is based upon an unreasonable search and seizure in contravention to the rights of the defendants, and based upon a search and seizure without warrant or authority in law.

The COURT.—The motion is denied. Exception allowed.

WHEREUPON, after argument by counsel, the Court delivered its instructions to the jury as follows:

In the District Court for the Territory of Alaska,
Third Division.

No. 874—CRIMINAL.

UNITED STATES OF AMERICA

vs.

C. F. PETERSON and CLINTON MAELHORN,
Defendants.

Instructions of Court to Jury.

Gentlemen of the Jury:

The defendants are charged by the complaint in this case with the crime of wilfully having intoxicating liquor in their possession on July 20, 1922, in Knik precinct, within the jurisdiction of this Court. In order to find the defendants, or either of them, guilty of the charge it will be necessary that you find that every essential element thereof is proven; that is, it must be proven that defendants, or one of them, wilfully had intoxicating liquor, to wit, whisky, commonly called white mule, in his possession within the jurisdiction of this Court.

[43]

It is not necessary to find that the offense was committed, if it was committed, on the precise day stated in the complaint; it is sufficient if it was committed within two years prior to the filing of the complaint.

You are instructed that the complaint in this case is a mere accusation or charge against the defendants, and is not of itself any evidence of the defend-

ant's guilt, and no juror should permit himself to be influenced against the defendants because the complaint has been filed against them.

The jury are instructed that the law presumes every defendant in a criminal trial to be innocent until his guilt is proven to the satisfaction of the jury beyond all reasonable doubt. The burden of proving beyond all reasonable doubt every material allegation necessary to establish the defendant's guilt rests upon the prosecution throughout the trial, and the burden of proof never shifts to the defendant. His presumption of innocence is a right guaranteed to him by law and must be given full force and effect by you until you become satisfied from a consideration of all the evidence in the case of his guilt beyond all reasonable doubt. A reasonable doubt is such a doubt as may fairly and naturally arise in your minds after fully and fairly considering all the evidence in the case. It is that state of the case which leaves the minds of the jurors, after comparison and consideration of all the evidence, in such condition that they cannot say they feel an abiding conviction to a moral certainty of the guilt of the defendant. A moral certainty is not an absolute certainty, but such a certainty as excludes every reasonable hypothesis creating a doubt. [44]

It is your duty to give to the testimony of each and all of the witnesses such credit as you consider their testimony justly entitled to receive, and in doing so you should not regard the remarks or expressions of counsel, unless the same are in con-

formity with the facts proven, or are reasonably deducible from such facts and the law as given to you in these instructions.

You are instructed that the evidence is to be estimated not only by its own intrinsic weight, but also according to the testimony which it is within the power of one side to produce and of the other side to contradict and, therefore, if the weaker and less satisfying evidence is produced when it appears, that it was within the power of the party offering the same to produce stronger and more satisfying evidence, such evidence, if so offered, should be viewed with distrust.

In determining the credit you will give a witness, and the weight and value you will attach to his testimony, you should take into consideration the conduct and appearance of the witness upon the witness-stand; his interest, if any, in the result of the trial; his apparent motives; his relation to or feeling for or against the defendant; the probability or lack of it of the testimony given; the opportunity the witness had to observe and to be informed upon the matters concerning which he testifies; and his apparent candor in giving the testimony. You should be slow to believe that any witness is testifying falsely, but should try to reconcile the testimony of all the witnesses so as to give credit to all of the testimony, if possible. In considering the testimony you should employ your everyday knowledge of human affairs and human nature. [45]

You are not bound to find in conformity with the testimony of any number of witnesses which does not produce conviction in your minds, against a less number or against a presumption or other evidence satisfying you.

If you find that any witness has wilfully testified falsely in one part of his testimony, you are at liberty to reject all or any part of his testimony, but you are not bound to do so. You should reject the false part and may give such weight to the remainder as you may think it is entitled to receive.

You are instructed that evidence is of two kinds, direct and circumstantial. Direct evidence is a statement of a witness testifying concerning facts which he claims to know of his own knowledge. Circumstantial evidence is the proving of certain facts and circumstances in a certain case from which the jury may infer other and connected facts which usually and reasonably follow according to the common experience of mankind. Crime may be proven by circumstantial evidence as well as by direct evidence of the witnesses, but the facts and circumstances in evidence should be consistent with each other and with the guilt of the defendant and inconsistent with any reasonable theory of the defendant's innocence. In this case the evidence is nearly all direct evidence of persons claiming to be eye-witnesses. Some of it, however, is of the class known as circumstantial, particularly certain facts testified to by witnesses for the prosecution, which the prosecution claims tends to connect the defend-

ants with the offense charged. Circumstantial evidence is legal and competent in criminal cases and is to be given such [46] weight as the jury may think it is entitled to receive. In considering both direct and circumstantial evidence the jury are entitled to apply to it their own knowledge of the everyday affairs of life and of common human motives and actions.

Possession may be actual or constructive. Actual possession means physical dominion; that is, under immediate physical control. Constructive possession means the right of possession and right of control. A man may have constructive possession of property not in his possession if he has the right to take actual possession at will.

In determining the question of possession in this case, the jury will consider all the testimony—direct and circumstantial. The actual presence of a man near the property involved does not of itself establish either possession or right of possession, but is evidence to be considered in connection with all the other facts in determining whether or not the party charged is in possession, either actual or constructive. Temporary custody is possession if by authority or right.

Under the law of Alaska, mere possession of intoxicating liquor is unlawful and punishable under the provisions of the Alaska bone dry law. It is necessary, however, that the possession be with the knowledge of the fact that the article is intoxicating liquor. It is for you to determine under all the evidence in the case whether the defendants, or

either of them, had the custody of this liquor with knowledge of its character. [47]

You are instructed that a person charged with the commission of a crime shall at his own request, but not otherwise, be deemed a competent witness in his own behalf, the credit to be given to his testimony being left solely with the jury under the instructions of the Court.

In this case the defendant Maelhorn has testified as a witness. The credit to be given to the testimony of this defendant is left solely to you, and you should give it the same fair and candid consideration you do the testimony of other witnesses in the case, but you are entitled to take into consideration the interest of this defendant in the result of the trial as affecting or bearing upon his credibility.

The defendant Peterson in this trial has waived his right to become a witness in his own defense. It is his privilege, given him by law, to testify or not as he may see fit. The law provides that his waiver of the right to testify shall not create any presumption against him.

You are instructed that the failure of the defendant Peterson to testify in his own behalf is not to be considered by you in any way whatever in considering the question of his guilt or innocence. You are to consider that solely upon the evidence in the case. The presumption of innocence is carried with the defendants throughout the trial.

You are to consider the guilt or innocence of the defendants separately and render a separate ver-

dict as to each. You may find one of them guilty and the other not guilty.

E. E. RITCHIE,
Judge. [48]

Mr. RAY.—The defendants except to the instructions of the Court—to that portion of the instructions with reference to circumstantial evidence—as follows, as not applicable to the case in bar:

“You are instructed that evidence is of two kinds, direct and circumstantial. Direct evidence is a statement of a witness testifying concerning facts which he claims to know of his own knowledge. Circumstantial evidence is proving of certain facts and circumstances in a certain case from which the jury may infer other and connected facts which usually and reasonably follow according to the common experience of mankind. Crime may be proven by circumstantial evidence as well as by direct evidence of the witnesses, but the facts and circumstances in evidence should be consistent with each other and with the guilt of the defendant, and inconsistent with any reasonable theory of the defendant’s innocence. In this case the evidence is nearly all direct evidence of persons claiming to be eye-witnesses; some of it, however, is of the class known as circumstantial, particularly certain facts testified to by witnesses for the prosecution which the prosecution claims tends to connect the defendant with the offense charged. Circumstantial evidence is legal and compe-

tent in criminal cases and is to be given such weight as the jury may think it is entitled to receive. In considering both direct and circumstantial evidence the jury are entitled to apply to it their own knowledge of the everyday affairs of life and of common human motives and actions.

Exception allowed.

Mr. RAY.—The defendant also excepts to the following instruction:

“In determining the question of possession in this case, the jury will consider all the testimony—direct and circumstantial. The actual presence of a man near the property involved does not of itself establish either possession or right of possession, but is evidence to be considered in connection with all the other facts in determining whether or not the party charged is in possession, either actual or constructive. Temporary custody is possession if by authority or right.”

Exception allowed.

WHEREUPON the jury retired to deliberate on their verdict.

Case closed. [49]

I do certify that I am the official court reporter for the Third Division, Territory of Alaska; that as such I reported the proceedings had at the trial of the above-entitled cause, to wit: United States of America versus C. F. Peterson and Clinton Maelhorn, No. 874—Criminal; that the foregoing transcript is a full, true and correct transcript of the

evidence introduced and the proceedings had at the trial of said cause.

Dated at Valdez, Alaska, this sixteenth day of January, 1923.

JOHN W. LENAHA. [50]

In the District Court for the Territory of Alaska,
Third Division.

No. 874—CRIMINAL.

UNITED STATES OF AMERICA

vs.

C. F. PETERSON and CLINTON MAELHORN,
Defendants.

Verdict.

We, the jury duly empanelled and sworn in the above-entitled cause, do find defendant C. F. Peterson guilty; and we do find the defendant Clinton Maelhorn guilty, as charged in the complaint. And recommend that leniency of the Court be shown Clinton Mealhorn.

B. A. GRTER,
Foreman.

Entered in Court Journal A-2, page 362.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 7, 1922. W. N. Cuddy, Clerk. By S. N. Scott, Deputy. [51]

In the District Court for the Territory of Alaska,
Third Division.

No. 874—CRIMINAL.

UNITED STATES OF AMERICA

vs.

C. F. PETERSON and CLINTON MAELHORN,
Defendants.

Motion in Arrest of Judgment.

Come now the above-named defendants, and each of them, by their counsel of record, and pray that no judgment be rendered against them, or either of them, upon the verdict of "guilty," heretofore returned into court in said cause as to both said defendants, in that the facts stated in the complaint upon which said defendants were placed on trial do not constitute a crime, and are insufficiently pleaded to so constitute a crime; and, that the above-entitled court was and is without jurisdiction to place on trial, except upon indictment by grand jury, said defendants, and each of them, for the commission of an offense which may be punishable by imprisonment for a term of more than one year.

Dated at Anchorage, Alaska, December 7th, 1922.

C. F. PETERSON,

CLINTON MAELHORN,

Defendants.

By L. V. RAY,

Their Counsel of Record.

Receipt of copy of the original of the above motion in arrest of judgment acknowledged this 7th day of December, 1922.

SHERMAN DUGGAN,
United States Attorney.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 7, 1922. W. N. Cuddy, Clerk. By S. N. Scott, Deputy. [52]

In the District Court for the Territory of Alaska,
Third Division.

No. 874—CRIMINAL.

M. O.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

C. F. PETERSON and CLINTON MAELHORN,
Defendants.

Order Denying Motion in Arrest of Judgment.

This matter came on for hearing on motion in arrest of judgment of L. V. Ray, Esq., counsel for the defendants; the defendants being present in person and represented by their counsel, L. V. Ray, Esq.; the plaintiff being represented by Sherman Duggan, Esq., United States Attorney.

WHEREUPON, after argument, the motion was denied. [53]

In the District Court for the Territory of Alaska,
Third Division.

No. 874—CRIMINAL.

UNITED STATES OF AMERICA

vs.

C. F. PETERSON and CLINTON MAELHORN,
Defendants.

Judgment and Sentence.

This cause coming on to be heard before this Court on the 15th day of December A. D. 1922, and the plaintiff, United States of America, appearing and being represented by Sherman Duggan, United States Attorney, and the defendants being personally present in open court, in the custody of the United States Marshal, and appearing by and being represented by their attorneys, L. V. Ray and Leopold David, and the Court having fixed this date as the time to pass sentence and pronounce judgment upon defendants, C. F. Peterson and Clinton Maelhorn, in this action, and it appearing to the Court.

That defendants C. F. Peterson and Clinton Maelhorn, were convicted of the crime of having intoxicating liquor in their possession in violation of the act of Congress, approved February 14th, 1917, known as the Alaska Dry Law, in the Court of the United States Commissioner for Knik Precinct, Third Division, Territory of Alaska, and thereupon appealed said cause to this Court.

That on the 5th day of December, 1922, at the November 10th, 1922, term of the above-entitled court, held at Anchorage, Third Division, Territory of Alaska, defendants being personally present in court and being represented by L. V. Ray and L. David, their attorneys, and Sherman Duggan, United States Attorney, appearing for and representing plaintiff, and defendants then and there having been duly tried by a jury, and having been by said jury in said Court duly and regularly convicted, and the Court finding in accordance with said verdict of said jury that defendants are guilty and this being the time and place set and agreed upon for sentence and judgment in the above-entitled action, upon said verdict of guilty against said defendant, and defendants at [54] this time being present in person and by *his* attorneys, L. V. Ray and Leopold David, and being asked by the Court if they had any reason to give or suggest to the Court why judgment should not be pronounced upon them according to law, and defendants then and there showing no valid reason or excuse in that behalf, and the Court being fully advised,—

IT IS ORDERED AND ADJUDGED that as punishment for the offense above set forth you, C. F. Peterson, one of said defendants, be imprisoned for the term of nine (9) months in the federal jail at Anchorage, Third Division, Territory of Alaska, and that in addition thereto you pay a fine in the sum of nine hundred and no/100 (\$900.00) Dollars, and in default of the payment of such fine you serve a term in the above-named

federal jail not to exceed one (1) day for each \$2.00 of said fine unpaid, and that no costs be taxed in this action.

AND IT IS ORDERED AND ADJUDGED that as punishment for the offense above set forth you, Clinton Maelhorn, one of said defendants, be imprisoned for the term of five (5) months in the federal jail at Anchorage, Third Division, Territory of Alaska, and that in addition thereto you pay a fine in the sum of Five Hundred and no/100 (\$500.00) Dollars, and in default of the payment of such fine you serve a term in the above-named federal jail not to exceed one (1) day for each \$2.00 of said fine unpaid, and that no costs be taxed in this action.

And the United States marshal is hereby ordered and instructed, in pursuance of the judgment herein rendered, to take said C. F. Peterson and Clinton Maelhorn, defendants, into custody, in execution of said sentence. A certified copy of this judgment is a sufficient commitment to the United States Marshal, Third Division, Territory of Alaska, to take said defendants into custody and to carry out said judgment and sentence.

Done in open court at Anchorage Alaska, this 15th day of December, 1922.

E. E. RITCHIE,
Judge of District Court. [55]

In the District Court for the Territory of Alaska,
Third Division.

No. 874.

UNITED STATES OF AMERICA,

Plaintiff,

against

C. F. PETERSON,

Defendant.

Bail Bond Pending Writ of Error.

We, C. F. Peterson, Z. J. Loussac and P. O. Sundberg, jointly and severally, acknowledge ourselves indebted to the United States of America, in the sum of \$2,000, lawful money of the United States of America, to be levied on our, and each of our goods, chattels, lands and tenements, upon this condition.

WHEREAS, the said C. F. Peterson has sued out a Writ of Error from the judgment of the District Court for the Territory of Alaska, Third Division, in the case in said court wherein the United States of America was plaintiff and the said C. F. Peterson is defendant, for a review of said judgment in the United States Circuit Court of Appeals for the Ninth Circuit.

NOW, if the said C. F. Peterson shall appear and surrender himself in the District Court for the Territory of Alaska, Third Division, on and after filing in said District Court of the mandate of the said Circuit Court of Appeals, and from time to

time thereafter as he may be required to answer any further proceedings, and abide by and perform any judgment or order which may be had or rendered therein in this case, and shall abide by and perform any judgment or order which may be rendered in said United States Circuit Court of Appeals for the Ninth Circuit, and not depart from said District Court without leave thereof, then this obligation shall be void; otherwise to remain in full force and virtue.

WITNESS our hands and seals this 28th day of December, 1922.

C. F. PETERSON. (Seal) [56]

P. O. SUNDBERG. (Seal)

Z. J. LOUSSAC. (Seal)

Taken and approved this 29th day of December, 1922, before me,

E. E. RITCHIE,

District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 29, 1922. W. N. Cuddy, Clerk. By S. N. Scott, Deputy.

United States of America,
Territory of Alaska,—ss.

We, Z. J. Loussac and P. O. Sundberg, sureties on the foregoing bond, each for self and not one for the other, being severally duly sworn, deposes and says that he is a resident of the Territory of Alaska; that he is not a counselor or attorney at law, commissioner, marshal, clerk or any other officer of any court; that he is worth the amount of \$2,000.00 over

and above all his just debts and liabilities and exclusive of property exempt from execution.

P. O. SUNDBERG.

Z. J. LOUSSAC.

Subscribed and sworn to before me this 29th day of December, 1922.

E. E. RITCHIE,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 29, 1922. W. N. Cuddy, Clerk. By S. N. Scott, Deputy.
[57]

In the District Court for the Territory of Alaska,
Third Division.

No. 874—CRIMINAL.

UNITED STATES OF AMERICA

vs.

C. F. PETERSON and CLINTON MAELHORN,
Defendants.

Order Settling and Certifying Bill of Exceptions.

This cause having come on for hearing upon the motion of the defendant, C. F. Peterson, for an order settling and certifying his bill of exceptions to be used upon his writ of error about to be prosecuted to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and sentence made and pronounced herein on the 15th day of December, 1922, against the defendant C. F. Peter-

son, upon a verdict of guilty of wilfully and unlawfully having in his possession, jointly with his co-defendant Clinton Maelhorn, intoxicating liquor in violation of the provisions of the Act of Congress, approved February 14th, 1917, commonly known as the Alaska Dry Law, said offense being alleged in the complaint thereof as of the 20th day of July, 1922; and, it appearing that said defendant Peterson filing herein his proposed bill of exceptions, served the same upon counsel for the United States, giving due notice of the date and place of settlement of said bill of exceptions, and no amendments or objections to said bill of exceptions having been made by the United States; and, the undersigned Judge of said District Court having inspected and considered the same, and found such bill of exceptions to contain all the papers, pleadings, proceedings, and exceptions necessary to a determination of the questions involved and raised by the defendant Peterson's exceptions,—

It is therefore ordered that the foregoing bill of exceptions be and the same is hereby allowed, approved and settled, and that the same shall constitute defendant Peterson's bill of exceptions upon the prosecution of his writ of error in said cause.
[58]

And it is further ordered that this order shall be deemed and is taken as a certificate of the undersigned Judge of this court that each bill of exceptions consists of all the papers, pleadings, testimony, proceedings and exceptions filed, presented, had and done in said cause, and all of the matters upon

which said judgment of December 15th, 1922, is based, and of all matters and things necessary or proper for the determination of the questions involved herein or raised or attempted to be raised by said writ of error.

And I further certify that this cause was tried at the November, 1922, Anchorage term of this court; that said term is still alive having been adjourned by order of Court made December 30, 1922, to March 5, 1923; and the bill of exceptions herein is settled and signed this day at the Valdez term of this court because court is now in session at Valdez and not at Anchorage.

Done at Valdez, Alaska, this 1st day of March, 1923.

E. E. RITCHIE,

District Judge.

Entered Court Journal No. 13, page No. 801.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. March 1. 1923. W. N. Cuddy, Clerk. By S. I. Hemple, Deputy.
[59]

In the District Court for the Territory of Alaska,
Third Division.

No. 874—CRIMINAL.

UNITED STATES OF AMERICA

vs.

C. F. PETERSON,

Defendant.

Assignment of Errors.

Comes now the defendant, C. F. Peterson, who is the sole defendant prosecuting the writ of error in this cause, and makes and files the following assignments of error on which the defendant will rely in the prosecution of his writ of error herein:

First. The Court erred in permitting the witness Mossman to testify, over and against the objection and exception of the defendant, in that said Court was without jurisdiction to try said defendant upon the complaint filed in said cause, as shown by the bill of exceptions, as follows:

Mr. RAY.—The defendants object to the introduction of the testimony of the witness for the following reasons:

1. The complaint on which the defendants are sought to be placed on trial is signed “C. W. Mossman,” not in any official capacity. An indictment to be good would have to be signed “Sherman Duggan, United States Attorney.”

2. The Court is without jurisdiction to try these defendants in that it is in violation of the rights of the defendants as given by the fifth amendment to the Constitution of the United States providing that no person shall be held to answer for a capital or otherwise infamous crime unless by indictment of a grand jury.

3. That the Congress of the United States is without authority to pass legislation making the possession of intoxicating liquor an offense.

4. That the offense sought to be charged in this complaint is not set forth with sufficient certainty to apprise these defendants to which charge they must answer, and the complaint does not state sufficient facts in law to constitute a valid complaint.

The COURT.—The objection is overruled. Defendants allowed an exception. [60]

Second. The Court erred in permitting the witness Mossman to testify, over and against the objection and exception of the defendant, as follows:

Q. Just go ahead and state what was done there when you met the defendants at that time.

Mr. RAY.—At the time you intercepted the defendants, as you stated in the car, had you a search-warrant?

Mr. HURLEY.—We object to the question, if the Court please, as incompetent.

The COURT.—Objection overruled.

The WITNESS.—I had no search warrant, no sir.

Mr. RAY.—Have any other process of any kind?

The WITNESS.—No, sir.

Mr. RAY.—The defendants object to the further introduction of the testimony of this witness and any evidence obtained by him as the same was procured in violation of the fourth and fifth amendments to the Constitution of the United States providing that there shall be no illegal and unreasonable searches and seizures, and that a defendant shall not be com-

pelled to give incriminating testimony or further incriminating testimony against himself.

The COURT.—The objection is overruled. Exception allowed.

Third. The Court erred in permitting the witness Mossman to testify as to the ownership of a certain car or automobile, over and against the objection and exception of the defendant, as follows:

Q. And whose car was it?

Mr. RAY.—We object to the question as calling for a conclusion of the witness.

The COURT.—He may answer if he knows.

The objection is overruled. Exception allowed.

Fourth. The Court erred in permitting the witness Mossman to testify, over and against the objection and exception of the defendant, as follows:

Q. And is the contents of this bowl that you have poured from this keg part of the liquor that you found in the car on that day? [61]

Mr. RAY.—We object to the question. The liquor is not yet in evidence; and we object to the conduct of the prosecuting officer in thus making an attempt to introduce certain testimony before the Court has formerly passed upon and admitted such testimony.

Mr. HURLEY.—We will withdraw the question.

The COURT.—I think it was an oversight.

Q. I wish at that time to offer the—

Mr. RAY.—We except to the statement of the Court as not being sufficient under the circumstances which have arisen to correct the

error; and we object to the introduction of the kegs and contents for the reason that it is apparent on the testimony of the officer that he acted without process of any kind.

The COURT.—The objection is overruled. Exception allowed.

Fifth. The Court erred in admitting in evidence, over the objection and exception of the defendant a certain bowl and its contents, as follows:

Mr. HURLEY.—I want to offer this bowl and its contents in evidence, taken from Exhibit “A.”

Mr. RAY.—Objection on the same grounds. It was an unlawful seizure. Defendant also objects to the jurors acting as witnesses in that certain liquid has been circulated among them by the assistant United States Attorney.

The COURT.—The objection will be overruled. The bowl will be admitted in evidence and marked. Exception allowed.

Sixth. The Court erred in denying the motion of the defendants to strike the testimony of the witness Mossman, to the denial of which motion exception was taken and allowed by the Court, as follows:

Mr. RAY.—The defendants move to strike the testimony of the witness Mossman as to any facts testified by him on the ground that the said officer acted without process of law, either a search-warrant or warrant of arrest for these defendants, in violation of the constitution rights provided in the fourth and fifth amendments to the Constitution of the United States,

and was in effect an illegal search and illegal seizure.

The COURT.—The motion is denied. Exception allowed.

Seventh. The Court erred in permitting the witness Watson [62] to testify, over and against the objection and exception of the defendant, as follows:

Mr. RAY.—Did you have a search-warrant?

A. No, sir.

Mr. RAY.—Any other warrant?

A. No, sir.

Mr. RAY.—We object to the introduction of testimony of this witness now sought to be elicited, on the ground that the same is in violation of the rights of the defendant as prescribed in the fourth and fifth amendments to the Constitution of the United States.

The COURT.—The objection is overruled. Exception allowed.

Eighth. The Court erred in denying the motion of the defendants to strike the testimony of the witness Watson, to the denial of which motion exception was taken and allowed by the Court, as follows:

Mr. RAY.—Defendants move to strike the testimony of the witness Watson on the ground that the testimony thus given is based upon a search without warrant of arrest or search-warrant, in contravention of the rights of the defendant established by the fourth and fifth amendments to the Constitution of the United States.

The COURT.—The motion is denied. Exception allowed.

Ninth. The Court erred in permitting the introduction of the testimony of the witness Mossman, recalled for further examination, as to conversations had with the defendant Peterson or the defendant Maelhorn at or about the time of the arrest, to the admission of which testimony the defendant objected and duly excepted to, as follows:

Mr. RAY.—Well, we object to the introduction of any statements made by the defendant while under arrest.

The COURT.—The objection is overruled. Exception allowed. [63]

Tenth. The Court erred in permitting the witness Green to testify, over and against the objection and exception of the defendants, as follows:

Mr. RAY.—Had you a search-warrant to search an automobile?

The WITNESS.—No, sir.

Mr. RAY.—Defendants object to the introduction of the testimony sought to be elicited from this witness on the ground that it was obtained without authority in law and in violation of the rights of these defendants as established by the fourth and fifth amendments to the Constitution of the United States.

The COURT.—The objection is overruled. Exception allowed.

Eleventh. The Court erred in denying the motion of the defendants to strike the testimony of the witness Green, to the denial of which motion exception was taken and allowed by the Court, as follows:

Mr. RAY.—I ask that the witness Green's testimony be stricken on the ground that the same is based on a seizure without search-warrant in contravention to the rights guaranteed to these defendants by the fourth and fifth amendments to the Constitution of the United States.

The COURT.—The motion is denied. Exception allowed.

Twelfth. The Court erred in denying the motion of the defendants for an instructed verdict of not guilty, to the denial of which motion the defendants excepted, as follows:

Mr. RAY.—Defendants now move the Court for a directed verdict of not guilty on the ground that the testimony introduced is not sufficient in law to justify or warrant the conviction of the defendants or either of them; further, that such testimony was elicited, and by the Court permitted to be introduced in evidence over and against the objections of the defendants, and each of them, in that such testimony based upon an unreasonable search and seizure in contravention to the rights of the defendants, and based upon a search and seizure without warrant or authority in law.

The COURT.—The motion is denied. Exception allowed. [64]

the defendant in arrest of judgment, as follows:

“Come now the above-named defendants, and each of them, by their counsel of record, and pray that no judgment be rendered against

them, or either of them, upon the verdict of 'guilty' heretofore returned into court in said cause as to both said defendants, in that the facts stated in the complaint upon which said defendants were placed on trial do not constitute a crime, and are insufficiently pleaded to so constitute a crime; and, that the above-entitled Court was and is without jurisdiction to place on trial, except upon indictment by grand jury, said defendants, and each of them, for the commission of an offense which may be punishable by imprisonment for a term of more than one year.

Dated at Anchorage, Alaska, December 7, 1922."

Fourteenth. The Court erred in entering judgment in said cause against the defendant Peterson.

WHEREFORE, the defendant, C. F. Peterson, as plaintiff in error, prays that the judgment and sentence of the District Court for the Territory of Alaska, Third Division, made and pronounced on the 15th day of December, 1922, may be reversed, set aside and vacated.

L. V. RAY,

Attorney for Plaintiff in Error.

Service of the foregoing assignment of errors, by receipt of copy thereof, admitted this 2d day of November, 1923.

SHERMAN DUGGAN,

U. S. Attorney.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 3, 1923. W. N. Cuddy, Clerk. [65]

In the District Court for the Territory of Alaska,
Third Division.

No. 874—CRIMINAL.

UNITED STATES OF AMERICA,

Plaintiff,

against

C. F. PETERSON,

Defendant.

Petition on Writ of Error.

Comes now the above-named defendant C. F. Peterson, and says: That on the 15th day of December, 1922, this Court entered judgment against the defendant upon a verdict of guilty of the offense of having intoxicating liquor in his possession, July 20th, 1922, in violation of the Act of Congress approved February 14th, 1917, known as "An Act to Prohibit the Manufacture and Sale of Alcoholic Liquors in the Territory of Alaska and for other purposes" (said act being commonly known as the Alaska Bone Dry Law), directing the imprisonment of said defendant for the period of nine months in the federal jail at Anchorage, Alaska, and the payment of a fine in the sum of \$900.00; and further that C. F. Peterson be imprisoned in the federal jail at Anchorage, Alaska, until such fine be satisfied; said imprisonment not to exceed one (1) day

for every Two Dollars (\$2.00) of such fine; and that said C. F. Peterson serve one day for every Two Dollars of such fine of \$900.00 that he shall fail or refuse to pay and being in addition to said imprisonment of nine (9) months. [66]

That in said judgment, and in the proceedings had prior thereto, certain errors were committed to the prejudice of the defendant, all of which more fully appear in the assignment of errors, which is filed with this petition.

WHEREFORE the defendant prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the errors so complained of, and that the transcript of the record, testimony, proceedings, and papers in this cause, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may be proper therein.

L. V. RAY,

Attorney for Defendant.

Service of the above petition for writ of error admitted this 3d day of November, 1923, by receipt of copy thereof.

SHERMAN DUGGAN,

United States Attorney.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 3, 1923. W. N. Cuddy, Clerk. [67]

In the District Court for the Territory of Alaska,
Third Division.

No. 874—CRIMINAL.

UNITED STATES OF AMERICA,

Plaintiff,

against

C. F. PETERSON,

Defendant.

Order Allowing Writ of Error.

On this 3d day of November, A. D. 1923, came the defendant herein, by his attorney, and filed and presented to the Court his petition praying for the allowance of a writ of error and the assignment of errors intended to be urged by him; praying, also, that a transcript of the record, testimony, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises;

And, it appearing to the Court, the said defendant has heretofore filed herein a duly approved appearance or bail bond, and also a duly approved cost bond.

NOW, THEREFORE, in consideration of the premises, and the Court being fully advised,—

IT IS ORDERED that the aforesaid writ of error be, and the same is hereby allowed. [68]

IT IS FURTHER ORDERED that the duly approved bond heretofore filed in this cause by the defendant shall operate as a supersedeas, or stay of sentence.

And IT IS FURTHER ORDERED that a transcript of the record, testimony, files and proceedings in this cause, save as modified by the order of this Court relative to certain of the original exhibits introduced in evidence in said cause, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

E. E. RITCHIE,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 3, 1923. W. N. Cuddy, Clerk. [69]

In the District Court for the Territory of Alaska,
Third Division.

No. 874—CRIMINAL.

UNITED STATES OF AMERICA,
Plaintiff,
against

C. F. PETERSON,
Defendant.

Undertaking for Costs.

A judgment having been given on the 15th day of December, 1922, whereby the above-named defendant, C. F. Peterson, after having been found

guilty, of the offense of having intoxicating liquor in his possession on July 20, 1922, in violation of the Act of Congress approved February 14th, 1917, known as "An Act to Prohibit the Manufacture and Sale of Alcoholic Liquors in the Territory of Alaska and for other purposes" and sentenced to pay a fine of Nine Hundred Dollars (\$900.00) and also that said defendant be imprisoned for the period of nine months in the federal jail at Anchorage, Alaska, and said defendant having appealed from said sentence and judgment to the United States Circuit Court of Appeals for the Ninth Circuit,

We, P. O. Sundberg, of Anchorage, Alaska, by occupation merchant and Z. J. Loussac, of Anchorage, Alaska, by occupation druggist, hereby undertake that the above-named defendant, C. F. Peterson, shall pay all costs that may be awarded against him on appeal not exceeding the sum of \$250.00.

IN WITNESS WHEREOF, we have hereunto set our hands this 20th day of October, 1923.

C. F. PETERSON,

Principal.

P. O. SUNDBERG.

Z. J. LOUSSAC.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 3, 1923. W. N. Cuddy, Clerk. [70]

United States of America,
Territory of Alaska,—ss.

P. O. Sundberg and Z. J. Loussac, being severally first duly sworn on oath, each for self and not

one for the other, depose and say: That they are the persons who signed the within undertaking; that they are not attorneys or counselors at law, U. S. Commissioner, U. S. Marshal, Deputy U. S. Marshal, Clerk of the District Court or other officer of any court; that they are worth the sum specified in the foregoing undertaking as the penalty thereof over and above all their just debts and liabilities and exclusive of property exempt from execution.

P. O. SUNDBERG.

Z. J. LOUSSAC.

Subscribed and sworn to before me this 20th day of October, 1923.

LEOPOLD DAVID,

Notary Public for Alaska, Residing at Anchorage,
Alaska.

My commission expires Sept. 24, 1925.

The foregoing bond approved this 3d day of November, 1923.

E. E. RITCHIE,

District Judge. [71].

In the District Court for the Territory of Alaska,
Third Division.

No. 874—CRIMINAL.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,
against

C. F. PETERSON,
Defendant and Plaintiff in Error.

Writ of Error.

The United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States, to the Honorable E. E. RITCHIE, Judge of the District Court for the Territory of Alaska, Third Division, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in said District Court before you, between the United States of America, plaintiff, and C. F. Peterson, defendant, manifest error hath happened to the great damage of the said defendant C. F. Peterson, as is stated in his petition herein, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, within thirty days from the date of this writ, so that you have the same in said court [72] at San Francisco, in the State of California, in said Circuit, to be then and there held; that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 3d day of November, in the year of our Lord one thousand nine hundred and twenty-three, and in the 148th year of the Independence of the United States of America.

Allowed by:

E. E. RITCHIE,

Judge of the District Court for the Territory of Alaska, Third Division.

Attest:

W. N. CUDDY,

Clerk of the District Court for the Territory of Alaska, Third Division.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 3, 1923. W. N. Cuddy, Clerk. [73]

In the District Court for the Territory of Alaska,
Third Division.

No. 874—CRIMINAL.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,
against

C. F. PETERSON,
Defendant and Plaintiff in Error.

Citation on Writ of Error (Original).

United States of America,
Territory of Alaska,—ss.

The United States of America to the Attorney
General of the United States, and to Honorable
SHERMAN DUGGAN, United States
Attorney for the Territory of Alaska, Third
Division, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held in the city of San Francisco, in the State of California within thirty days from the date of this writing, pursuant to a writ of error filed in the clerk's office of the District Court for the Territory of Alaska, Third Division, wherein C. F. Peterson is plaintiff in error, and the United States of America is defendant in error, and show cause, if any there be, why the judgment in said writ of error should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 3d day of November in the year of our Lord one thousand nine hundred and twenty-three and in the 148th year of the Independence of the United States of America.

E. E. RITCHIE,
District Judge, Territory of Alaska.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 3, 1923. W. N. Cuddy, Clerk. [74]

United States of America,
Territory of Alaska,
Third Division,—ss.

I, the undersigned clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the attached is a full, true and correct copy of the original citation on writ of error in the case of the United States of America against C. F. Peterson, Cause No. 874—Criminal as the same appears on file and of record in my office.

IN TESTIMONY WHEREOF, I have subscribed my name and affixed the seal of the said court at Valdez, Alaska, this 3d day of November, 1923.

[Seal]

W. N. CUDDY,
Clerk.

By _____,
Deputy. [74½]

In the District Court for the Territory of Alaska,
Third Division.

No. 874—CRIMINAL.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,
against

C. F. PETERSON,
Defendant and Plaintiff in Error.

Citation on Writ of Error (Copy).

United States of America,

Territory of Alaska,—ss.

The United States of America to the Attorney General of the United States, and to Honorable SHERMAN DUGGAN, United States Attorney for the Territory of Alaska, Third Division, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held in the city of San Francisco, in the State of California, within thirty days from the date of this writing, pursuant to a writ of error filed in the clerk's office of the District Court for the Territory of Alaska, Third Division, wherein C. F. Peterson is plaintiff in error, and the United States of America is defendant in error, and show cause, if any there be, why the judgment in said writ of error should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 3d day of November, in the year of our Lord one thousand nine hundred and twenty-three, and in the 148th year of the Independence of the United States of America.

E. E. RITCHIE,

District Judge, Territory of Alaska.

Service acknowledged this 3d day of November, 1923, by receipt of a certified copy of citation.

SHERMAN DUGGAN,

U. S. Attorney. [75]

In the District Court for the Territory of Alaska,
Third Division.

**Certificate of Clerk U. S. District Court to Trans-
script of Record.**

United States of America,
Territory of Alaska,
Third Division,—ss.

I, W. N. Cuddy, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the above and foregoing, and hereto annexed 75 pages, numbered from 1 to 75, inclusive, are a full, true and correct transcript of records and files of *of* the proceedings in the above-entitled cause, as the same appears on the records and files in my office; that this transcript is made in accordance with the defendant's praecipe on file herein.

I FURTHER CERTIFY that the foregoing transcript has been prepared, examined and certified to by me on behalf of the defendant, plaintiff in error, and that the costs thereof, amounting to \$18.00 have been paid to me by L. V. Ray, Esq., attorney for the defendant and plaintiff in error.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court this 3d day of November, A. D. 1923.

[Seal]

W. N. CUDDY,
Clerk. [76]

[Endorsed]: No. 4146. United States Circuit Court of Appeals for the Ninth Circuit. C. F. Peterson, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Third Division.

Filed November 17, 1923.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

C. F. PETERSON,

Plaintiff in Error,

vs.

THE UNITED STATES OF
AMERICA,

Defendant in Error.

No. 4146

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
TERRTIORY OF ALASKA, THIRD
DIVISION.

BRIEF OF PLAINTIFF IN ERROR.

JOHN F. DORE,
FRANCIS C. REAGAN,
Seattle, Washington.
L. V. RAY,
Seward, Alaska,

Attorneys for Plaintiff in Error.

J. L. MACDONALD CO., PRINTERS AND PUBLISHERS, SEATTLE

FILED

MAR 1 - 1924

U.S. DISTRICT COURT

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

C. F. PETERSON,

Plaintiff in Error,

vs.

THE UNITED STATES OF
AMERICA,

Defendant in Error.

No. 4146

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
TERRTIORY OF ALASKA, THIRD
DIVISION.

BRIEF OF PLAINTIFF IN ERROR.

JOHN F. DORE,

FRANCIS C. REAGAN,

Seattle, Washington.

L. V. RAY,

Seward, Alaska,

Attorneys for Plaintiff in Error.

STATEMENT OF THE CASE.

Plaintiff in error, C. F. Peterson, was charged in a complaint filed before W. H. Rager, United States Commissioner and ex-officio justice of the peace for Knik Precinct, in the Territory of Alaska, on the 20th day of July, 1922, with unlawfully and wilfully having in his possession intoxicating liquor in violation of the provisions of the Act of Congress approved February 14, 1917, commonly known as the Alaska Bone Dry Law. Thereafter a trial was had before said Commissioner and plaintiff in error was found guilty. An appeal was taken from the judgment of said Commissioner to the United States District Court for the Territory of Alaska, Third Division, and upon a trial before said court the plaintiff in error was again found guilty and sentenced to be imprisoned for a term of nine months in the federal jail at Anchorage, Alaska, and in addition thereto to pay a fine of \$900.00, in default of the payment of which he was sentenced to serve one day in the federal jail at Anchorage for each two dollars of the fine unpaid.

ASSIGNMENT OF ERRORS.

First. The Court erred in permitting the witness Mossman to testify, over and against the objection and exception of the defendant, in that said

Court was without jurisdiction to try said defendant upon the complaint filed in said cause, as shown by the bill of exceptions, as follows:

Mr. RAY.—The defendants object to the introduction of the testimony of the witness for the following reasons:

1. The complaint on which the defendants are sought to be placed on trial is signed C. W. Mossman,' not in any official capacity. An indictment to be good would have to be signed 'Sherman Duggan, United States Attorney.'"

2. The Court is without jurisdiction to try these defendants in that it is in violation of the rights of the defendants as given by the fifth amendment to the Constitution of the United States providing that no person shall be held to answer for a capital or otherwise infamous crime unless by indictment of a grand jury.

3. That the Congress of the United States is without authority to pass legislation making the possession of intoxicating liquor an offense.

4. That the offense sought to be charged in this complaint is not set forth with sufficient certainty to apprise these defendants to which charge they must answer, and the complaint does not state sufficient facts in law to constitute a valid complaint.

The COURT.—The objection is overruled. Defendants allowed an exception. [60]

Second. The Court erred in permitting the witness Mossman to testify, over and against the objection and exception of the defendant, as follows:

Q. Just go ahead and state what was done there when you met the defendants at that time.

Mr. RAY.—At the time you intercepted the defendants, as you stated in the car, had you a search-warrant?

Mr. HURLEY.—We object to the question, if the Court please, as incompetent.

The COURT.—Objection overruled.

The WITNESS.—I had no search warrant, no, sir.

Mr. RAY.—Have any other process of any kind?

The WITNESS.—No, sir.

Mr. RAY.—The defendants object to the further introduction of the testimony of this witness and any evidence obtained by him as the same was procured in violation of the fourth and fifth amendments to the Constitution of the United States providing that there shall be no illegal and unreasonable searches and seizures, and that a defendant shall not be compelled to give incriminating testimony or further incriminating testimony against himself.

The COURT.—The objection is overruled. Exception allowed.

Third. The Court erred in permitting the witness Mossman to testify as to the ownership of a certain car or automobile, over and against the objection and exception of the defendant, as follows:

Q. And whose car was it?

Mr. RAY.—We object to the question as calling for a conclusion of the witness.

The COURT.—He may answer if he knows.

The objection is overruled. Exception allowed.

Fourth. The Court erred in permitting the witness Mossman to testify, over and against the objection and exception of the defendant, as follows:

Q. And is the contents of this bowl that you have poured from this keg part of the liquor that you found in the car on that day?
[61]

Mr. RAY.—We object to the question. The liquor is not yet in evidence; and we object to the conduct of the prosecuting officer in thus making an attempt to introduce certain testimony before the Court has formerly passed upon and admitted such testimony.

Mr. HURLEY.—We will withdraw the question.

The COURT.—I think it was an oversight.

Q. I wish at that time to offer the—

Mr. RAY.—We except to the statement of the Court as not being sufficient under the circumstances which have arisen to correct the error; and we object to the introduction of the kegs and contents for the reason that it is apparent on the testimony of the officer that he acted without process of any kind.

The COURT.—The objection is overruled. Exception allowed.

Fifth. The Court erred in admitting in evidence, over the objection and exception of the defendant a certain bowl and its contents, as follows:

Mr. HURLEY.—I want to offer this bowl and its contents in evidence, taken from Exhibit "A."

Mr. RAY.—Objection on the same grounds. It was an unlawful seizure. Defendant also objects to the jurors acting as witnesses in that certain liquid has been circulated among them by the assistant United States Attorney.

The COURT.—The objection will be overruled. The bowl will be admitted in evidence and marked. Exception allowed.

Sixth. The Court erred in denying the motion of the defendants to strike the testimony of the witness Mossman, to the denial of which motion exception was taken and allowed by the Court, as follows:

Mr. RAY.—The defendants move to strike the testimony of the witness Mossman as to any facts testified by him on the ground that the

said officer acted without process of law, either a search-warrant or warrant of arrest for these defendants, in violation of the constitution rights provided in the fourth and fifth amendments to the Constitution of the United States, and was in effect an illegal search and illegal seizure.

The COURT.—The motion is denied. Exception allowed.

Seventh. The Court erred in permitting the witness Watson to testify, over and against the objection and exception of the defendant, as follows:

Mr. RAY.—Did you have a search-warrant?

A. No, sir.

Mr. RAY.—Any other warrant?

A. No, sir.

Mr. RAY.—We object to the introduction of testimony of this witness now sought to be elicited, on the ground that the same is in violation of the rights of the defendant as prescribed in the fourth and fifth amendments to the Constitution of the United States.

The COURT.—The objection is overruled. Exception allowed.

Eighth. The Court erred in denying the motion of the defendants to strike the testimony of the witness Watson, to the denial of which motion exception was taken and allowed by the Court, as follows:

Mr. RAY.—Defendants move to strike the testimony of the witness Watson the ground that the testimony thus given is based upon a search without warrant of arrest or search-warrant, in contravention of the rights of the defendant established by the fourth and fifth amendments to the Constitution of the United States.

The COURT.—The motion is denied. Exception allowed.

Ninth. The Court erred in permitting the introduction of the testimony of the witness Mossman, recalled for further examination, as to conversations had with the defendant Peterson or the defendant Maelhorn at or about the time of the arrest, to the admission of which testimony the defendant objected and duly excepted, as follows:

Mr. RAY.—Well, we object to the introduction of any statements made by the defendant while under arrest.

The COURT.—The objection is overruled. Exception allowed. [63]

Tenth. The Court erred in permitting the witness Green to testify, over and against the objection and exception of the defendants, as follows:

Mr. RAY.—Had you a search-warrant to search an automobile?

The WITNESS.—No, sir.

Mr. RAY.—Defendants object to the introduction of the testimony sought to be elicited from this witness on the ground that it was obtained without authority in law and in violation of the rights of these defendants as established by the fourth and fifth amendments to the Constitution of the United States.

The COURT.—The objection is overruled. Exception allowed.

Eleventh. The Court erred in denying the motion of the defendants to strike the testimony of the witness Green, to the denial of which motion exception was taken and allowed by the Court, as follows:

Mr. RAY.—I ask that the witness Green's testimony be stricken on the ground that the same is based on a seizure without search-warrant in contravention to the rights guaranteed to these defendants by the fourth and fifth amendments to the Constitution of the United States.

The COURT.—The motion is denied. Exception allowed.

Twelfth. The Court erred in denying the motion of the defendants for an instructed verdict of not guilty, to the denial of which motion the defendants excepted, as follows:

Mr. RAY.—Defendants now move the Court for a directed verdict of not guilty on the ground that the testimony introduced is

not sufficient in law to justify or warrant the conviction of the defendants or either of them; further, that such testimony was elicited, and by the Court permitted to be introduced in evidence over and against the objections of the defendants, and each of them, in that such testimony based upon an unreasonable search and seizure in contravention to the rights of the defendants, and based upon a search and seizure without warrant or authority in law.

The COURT.—The motion is denied. Exception allowed. [64]

the defendant in arrest of judgment, as follows:

“Come now the above-named defendants, and each of them, by their counsel of record, and pray that no judgment be rendered against them, or either of them, upon the verdict of ‘guilty’ heretofore returned into court in said cause as to both said defendants, in that the facts stated in the complaint upon which said defendants were placed on trial do not constitute a crime, and are insufficiently pleaded to so constitute a crime; and, that the above-entitled Court was and is without jurisdiction to place on trial, except upon indictment by grand jury, said defendants, and each of them, for the commission of an offense which may be punishable by imprisonment for a term of more than one year.”

ARGUMENT.

I. Assignments of Error II, III, IV, V, VI, VII, VIII, X and XI are predicated on the proposition that the evidence upon which a conviction was had in this case was obtained upon an illegal

search and seizure, and that the same was not admissible.

The evidence of Deputy Marshal Mossman, who made the arrest, is to the effect that the officers were driving their car along the road out of Anchorage, Alaska, when they came upon the car of the plaintiff in error, at a place where it was impossible to pass the same; that he got out of his car and went over to the car of the plaintiff in error, which had storm curtains on it; that he could see that there was something in the space between the front and rear seat; got into the car and found in there several kegs (Tr. pp. 28, 29).

Watson, another deputy United States marshal, testified that they saw some barrels in the car and that Mossman went in the car (Tr. p. 35).

Another witness for the Government testified that their car was stopped and they went and looked into plaintiff in error's car and saw there some kegs (Tr. p. 42); that Mossman went first and opened up the side curtains, it being a closed car and had curtains (Tr., p. 43).

Cadwallader, another Government witness, stated that at the place where they came upon this car it was impossible for two cars to pass (Tr., p. 47).

It will thus be seen from an examination of the evidence that the officers did not know what was in the car nor the contents of the kegs; that they simply arrested plaintiff in error upon suspicion; that there is nothing in the evidence as to plaintiff in error's actions or acts which could amount to even a suspicion. In other words, the record is absolutely silent as to the motive or reason which caused the officers to search this car.

It is plaintiff-in-error's contention that under the record the evidence was illegally seized and acquired; that plaintiff in error was compelled to supply evidence against himself and that the same was improperly admitted.

The fourth amendment to the Constitution of the United States provides:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

The Fifth Amendment further provides:

“No person * * * * shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

This case is not unlike the case of *United States vs. Myers*, 287 Fed. 260, where the officer thought from his observation that the driver of another car was intoxicated, and drove on until he came to a bridge where he turned his automobile across it, so that the defendant could not pass. When the automobile stopped, without the consent of the owner, he opened the door of the automobile, searched it, and found liquor therein. He had no search warrant, nor did he have the owner's consent to search the car. In the present case there is no indication from the record that the officers knew or dreamed that there was any liquor in the car. There is nothing to indicate that the plaintiff in error was acting other than as an ordinary citizen. The District Court in the *Myers* case held that the evidence was illegally acquired, and that under the fifth amendment it could not be used against the defendant.

In *United States vs. Kaplan*, 286 Fed. 973, it was held that the fact of finding liquor by reason in an automobile could not justify the search.

The following cases announce the principles that we are contending for:

United States vs. Slusser, 270 Fed. 819.

Hoyer vs. State, 193 N. W. 89.

Boyd vs. United States, 116 U. S. 616.

Weeks vs. United States, 232 U. S. 383.

Amos vs. United States, 255 U. S. 313.

Gouled vs. United States, 255 U. S. 298.

Snyder vs. United States, 285 Fed. 1.

Giles vs. United States, 284 Fed. 208.

United States vs. Ovaritius, 267 Fed. 227.

The case of *Lambert vs. United States*, 282 Fed. 413, decided by this court, is not in point, for in that case the officers had evidence that the defendant was committing a crime in their presence.

II. The Court erred in permitting the admission of testimony of the witness Mossman as to the conversation had with the plaintiff in error at the time of his arrest. The record affirmatively shows (Tr., p. 38) that the officers did not warn the plaintiff in error as to his constitutional rights as to making any statement. (Assignment of Error IX.)

It is true that the witness states that it was a voluntary statement, but that is merely a conclusion of the witness. It might not have been made if the officer had warned him of his constitutional right. In any event, it was the duty of the officer to warn him as to his constitutional rights. It being admitted that he failed to do so, the Court erred in admitting the statement.

United States vs. Kallas, 272 Fed. 742.

United States vs. Bell, 81 Fed. 830.

III. The Court was without jurisdiction to try plaintiff in error upon the complaint filed, as set out in Assignment of Error I. While we are aware that this court, in *Abbate vs. United States*, 270 Fed. 735, *Koppitz vs. United States*, 272 Fed. 96, and *Simpson vs. United States*, 290 Fed. 963, has held that the Alaska Bone Dry Law is valid, it appears from an examination of these cases shows that they were decided prior to the amendment to the National Prohibition Act of November 23, 1921 (c. 134, s. 5, 42 Stat. 223), or that this amendment was not called to the Court's attention, which provides:

“All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violation of such laws taht were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act.
* * *”

It will be noted that Congress in this amendment based the continuance of the then existing laws upon the one proposition that their provisions would still be in force except where such provisions were directly in conflict with any provision of the

National Prohibition Act. That the Alaska Bone Dry Law is in direct conflict with the National Prohibition Act is clear. In the present case, under the National Prohibition law, plaintiff in error could only be fined \$500.00, yet the record in this case shows that he was sentenced to nine months in jail and a fine of \$900.00—a direct conflict.

If this court gives to the word “all,” as used in this amendment, its common, ordinary meaning, it must construe the same to mean every law, whether general or special. It means all laws passed by Congress, and both the Bone Dry Law and the Prohibition Act are such. A reading of Section 2 of the Amendment to the Constitution would indicate that this is the only construction that could possibly be given to this amendment of 1921. There it is found that concurrent power to enforce is given to Congress and the several States, not to the Territory. It is going beyond the ordinary rules of construction to say that Congress intended that there should be two sets of laws for the same act in the same Territory, with different penalties. As we understand the rules of construction, it is that where there is a conflicting penalty, the lesser should be enforced.

There is another ground upon which the Court was without jurisdiction to try this case:

Section 3550, Comp. Stat., provides that all the laws of the United States shall have the same force and effect within the Territory of Alaska as within the United States.

Section 10509, Comp. Stat., provides:

“All offenses which may be punishable by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors.”

The judgment in this case shows that plaintiff in error was sentenced to nine months in jail and a fine of \$900.00, with the proviso, in default of payment of such fine, plaintiff in error serve a term in jail not to exceed one day for each \$2.00 of such fine unpaid. It is thus apparent that plaintiff in error may be imprisoned for a term exceeding one year under this charge, and that under the Fifth Amendment to the Constitution he was deprived of his right to have his case first presented to a grand jury.

IV. Assignment 12 relates to the trial court having overruled plaintiff-in-error's motion for an instructed verdict and in arrest of judgment. If our position upon the previous assignments herein

discussed, or upon any of them, is correct, the error of the court below in refusing an instructed verdict of not guilty and in entering a judgment and sentence upon the verdict is manifest and need not be discussed.

For the erros committed we respectfully urge that plaintiff in error be granted a new trial.

Respectfully submitted,

JOHN F. DORE,

L. V. RAY,

FRANCIS C. REAGAN,

Attorneys for Plaintiff in Error.

NO. 4146

In the
United States
Circuit Court of Appeals
For the Ninth Circuit

C. F. PETERSON,

Plaintiff in Error

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error

NO. 4146

Upon Writ of Error to the United States District
Court for the Territory of Alaska, Third Division

Brief for Defendant in Error

SHERMAN DUGGAN, United States Attorney,
Valdez, Alaska

HARRY G. MCCAIN, Assistant U. S. Attorney,
Cordova, Alaska

For the Defendant in Error.

In the
United States
Circuit Court of Appeals
For the Ninth Circuit
February Term, 1924.

C. F. PETERSON,

Plaintiff in Error

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error

NO. 4146

Upon Writ of Error to the United States District
Court for the Territory of Alaska, Third Division

Brief for Defendant in Error

Statement of the Case

Plaintiff in error, C. F. Peterson, and one Clinton Maelhorn were convicted in the Commissioner's Court for Knik Precinct, Third Division, Territory of Alaska,

before the Court, Hon. W. H. Rager, on August 11, 1922, upon a complaint charging unlawful possession of whiskey commonly called, "white mule," in violation of Section 1 of the Alaska Dry Law, which complaint is as follows:

**"In the United States Commissioner's Court for Knik
Precinct, Third Division, Territory of Alaska**

UNITED STATES OF AMERICA

NO.———

vs.

C. F. PETERSON and CLINTON MAELHORN

Complaint for the Violation of Section I, Act of Congress Approved February 14th, 1917, Known as the Alaska Dry Law.

(Filed August 12, 1922.)

C. F. Peterson and Clinton Maelhorn are accused by C. W. Mossman, Deputy United States Marshal for the Third Division of the Territory of Alaska, in this complaint of the crime of having intoxicating liquor in their possession, committed as follows:

The said C. F. Peterson and Clinton Maelhorn, on the 20th day of July, A. D. 1922, in Knik Precinct, in the Territory of Alaska and within the jurisdiction of this Court, then and there being, did then and there wilfully and unlawfully have in their possession intoxicating liquor, to wit, whiskey, commonly called "white mule," in violation of the provisions of the Act of Congress, approved February 14th, 1917, commonly known as the Alaska Dry Law, contrary to the

form of the statutes in such case made and provided, and against the peace and dignity of the United States of America.

C. W. MOSSMAN.

United States of America,
Territory of Alaska, ss.

I, C. W. Mossman, being first duly sworn, upon oath depose and say that the foregoing complaint is true; and that I am a Deputy United States Marshal for the Third Division of the Territory of Alaska.

C. W. MOSSMAN.

Subscribed and sworn to before me this 24th day of July, 1922.

(Seal)

W. H. RAGER,

U. S. Commissioner and Ex-Officio Justice of the Peace."

The appellant was sentenced in the Justice Court to nine months in jail and to pay a fine of \$900.00, and Maelhorn received the same sentence both as to imprisonment and fine. Both appealed to the District Court for the Territory of Alaska, Third Division, and were admitted to bail in the sum of \$2000.00, each. In said District Court both defendants were again convicted by a jury trial on December 7, 1922. Peterson was sentenced to serve a term of nine months in the Federal jail at Anchorage and to pay a fine of \$900.00 and he prosecutes this Writ of Error

against said judgment. Maelhorn submitted to the judgment of the court and does not appeal.

Appellant in his Assignment of Errors relies upon fourteen assignments of error, numbered from 1 to 14. There is apparently a misprint or typographical error on Record page 77 at the bottom thereof regarding assignment No. 13 and by reference to the Assignment of Errors the same assigns error on Motion in Arrest of Judgment.

The errors assigned may be classified under three heads with subdivisions.

1. Jurisdiction of the Court.

(a) Sufficiency of the complaint.

(b) Whether crime charged is infamous and indictment required.

(c) Constitutionality or legality of the Alaska Dry Law.

2. Error in Admission of Evidence.

(a) Admissability of liquor without search warrant.

(b) Admisability of statements by defendant while under arrest.

(c) Admisability of testimony concerning ownership of automobile.

3. Sufficiency of Evidence.

This brief is based upon the assignments of error and not upon the points of appellant's brief for the reason that the same has not yet been served. It is now the 8th day of February, and it will be impossible to await the service of such brief, which could not arrive for at least another week by the mails. The United States Attorney is required to be present in this court at San Francisco on March 5th. It will, therefore, be seen that to await the service of appellant's brief the government would not have sufficient time by any means to prepare brief, have it printed, make the journey to San Francisco and file the same three days before the case is called for argument, under the rule. Hence, as before stated, the reason for basing this brief upon all the assignments of error of appellant.

POINTS AND AUTHORITIES

Authority or right of any person other than officer to make complaint.

People vs. Stickle, (Mich) 121 NW 497.

16 Corpus Juris, Page 289, Sec. 497.

State vs. Howard (NH) 43 Atl. 592.

United States vs. Skinner, 27 Fed. Cas. No. 16,309.

State vs. Giles (Maine) 64 Atl. 619.

Com. vs. Murphy, (Mass.) 18 NE 418.

Com. vs. Alden (Mass.) 9 NE 15.

State vs. Woodmanse, (R. I.) 35 Atl. 961.

Wooten vs. State, (Tex) 121 SW 703.

A person convicted of violating the Alaska Dry Law, an Act of Congress approved February 14, 1917, cannot (1) be imprisoned in the penitentiary nor at hard labor; cannot (2) be imprisoned for a longer term than one year on a single charge; therefore (3) the offense is a misdemeanor, and can (4) be prosecuted under an information or complaint, as well as by indictment of a Grand Jury.

(1) **Alaska Dry Law, Sections 1, 24, etc.**

In Re Mills, 135 U. S. 263.

In Re Bonner, 151 U. S. 242.

Horner vs. State, 1 Oreg. 267.

Brooks vs. People, 24 Pac. 553 (Col.)

(2) **Alaska Dry Law, Sections 1, 24, etc.**

Ex Parte Jackson, 96 U. S. 727.

In Re MacDonald, 33 Pac. 20 (Wyo.)—distinguishing **Ex Parte Rosenheim**, 23 Pac. 372 (Cal.)

State vs. Baxter 21 Pac. 650 (Kan.)—citing in **Re Boyd**, 9 Pac. 240.

Ex Parte McGee, 54 Pac. 1091 (Oreg.)

In Re Newton, 58 N. W. 436 (Neb.)

Ex Parte Bryant, 4 S. 854 (Fla.)

Bailey vs. State, 6 S. 398 (Ala.)

Ex Parte Bolling, 31 Ill. 96

Davis vs. State, 22 Ga. 101.

(3) Alaska Dry Law, Sections 1, etc.

Compiled Laws of Alaska, 1913, Section 2065.

Act of March 4, 1909, C. 321, Sec. 336, 35 Stat. 1152; Barnes Federal Code, Sec. 10,038.

(4) Alaska Dry Law, Sections 18 and 28.

U. S. vs. Powers and Robertson, 1 Alaska 180, and cases cited on page 184.

John H. Breede vs. James M. Powers, U. S. Marshal, Sup. Ct. No. 45—Oct. Term, 1923 (Unreported to date).

Young vs. U. S. 272 Fed. 967 (9th Cir.)

U. S. vs. Achen, 267 Fed. 595 (E. D., N. Y.)

U. S. vs. Quaritus, 267 Fed. 227.

U. S. vs. Metzgar, 270 Fed. 291.

The Congress of the United States has authority to pass legislation making the possession of intoxicating liquor a crime, and the Alaska Dry Law is valid.

Binns vs. United States, 194 U. S. 490-1.

Street vs. Lincoln Safe Deposit Co. (S. D. N. Y.) 267 Fed. 706—See also same in 254 U. S. 88.

Rose vs. U. S. (6th Cir.) 274 Fed. 245.

U. S. vs. Murphy, (E. D. N. Y.) 264 Fed. 842.

Massey vs. U. S. (8th Cir.) 281 Fed. 293.

Page vs. U. S. (9th Cir.) 278 Fed. 41.

Jacob Ruppert vs. Caffey, 251 U. S. 264.

Abbate vs. U. S. (9th Cir.) 270 Fed. 735.

Simms vs. Simms, 175 U. S. 168.

Mormon Church vs. United States, 136 U. S. 1-42.

National Bank vs. County of Yankton, 101 U. S. 129-132.

Koppitz vs. United States, 272 Fed. 96.

The complaint under which defendant was convicted states facts sufficient to constitute a crime.

Cabiale vs. U. S. (9th Cir.) 276 Fed. 769, see par. 2.

Young vs. U. S. (9th Cir.) 272 Fed. 967.

Massey vs. U. S. (8th Cir.) 281 Fed. 293.

Heitler vs. U. S. (7th Cir.) 280 Fed. 703.

Strada vs. U. S. (9th Cir.) 281 Fed. 143.

Laurie vs. U. S. (6th Cir.) 278 Fed. 934.

Feigin vs. U. S. (9th Cir.) 279 Fed. 107.

U. S. vs. Everson (S. D. Fla.) 280 Fed. 126, distinguishing Dowling case

Vesely vs. U. S. (9th Cir.) 275 Fed. 693.

Millich et al. vs. U. S. (9th Cir.) 282 Fed. 604.

Herine vs. U. S. (9th Cir.) 276 Fed. 806.

Kathriner vs. U. S. (9th Cir.) 276 Fed. 808.

A search warrant is unnecessary to search an automobile, boat or other vehicle where the officer making the search has reasonable grounds to believe that contraband intoxicating liquors are being carried therein.

Lambert vs. U. S. 282 Fed. 413 (9th Cir.)

U. S. vs. Bateman, 278 Fed. 231 (S. D. Cal., N. D.)

U. S. vs. Fenton, 268 Fed. 221 (D. Mont.)

Boyd vs. U. S., 286 Fed. 930 (4th Cir.)

Bell vs. U. S., 285 Fed. 145 (5th Cir.)

McBride vs. U. S., 284 Fed. 416 (5th Cir.)

U. S. vs. Rembert, 284 Fed. 996 (S. D. Tex.)

Houck vs. State, 140 N. E. 112 (Ohio).

Elrod vs. Moss, 278 Fed. 123 (4th Cir.)

Vachina vs. U. S., 283 Fed. 25 (9th Cir.)

U. S. vs. Snyder, 278 Fed. 650 (N. D., W. Va.)
O'Connor vs. U. S., 281 Fed. 396 (D., N. J.)
U. S. vs. Vatune, 292 Fed. 497 (N. D. Cal., S. D.)
Ex Parte Morrill, 35 Fed. 261 (Cir. Ct. Oreg.)
U. S. vs. Welsh, 247 Fed. 239 (S. D., N. Y.)

Statements and conversations made to a Deputy U. S. Marshal or other officer, either before or after arrest, which were voluntary, and not induced by duress, intimidation or other improper influences, are admissible, and the officer may testify to them at the trial.

Perovich vs. U. S., 205 U. S. 86.
Wilson vs. U. S., 162 U. S. 613.
Mangun vs. U. S., 289 Fed. 213 (9th Cir.)
Murray vs. U. S., 288 Fed. 1008 (Ct. of App., D. C.)
Murphy vs. U. S., 285 Fed. 801 (7th Cir.)
Wiggins vs. U. S., (2nd Circuit) 272 Fed. 41.
State vs. Brinkley, 105 Pac. 708 (Oreg.)
State vs. Crowder, 21 Pac. 208 (Kan.) See Par. 2 and cases there cited.

Admissions admitted by trial Judge in the exercise of his discretion will not be disturbed unless there is apparent and manifest error.

Rogoway vs. State, 78 Pac. 987.
State vs. Humphrey et al 128 Pac. 824 (Oreg.)
State vs. Morris, 163 Pac. 567 (Oreg.) See par. 5-6.
Mangun vs. U. S. 289 Fed. 213 (9th Cir.)

The Court, in the instructions to the jury, correctly stated the law of "possession"; there was "substantial" evidence that defendant was the possessor of the intoxicating liquor; the weight of the evidence is for the jury, and Appellate Courts will not disturb the verdict.

Compiled Laws of Alaska, 1913, Sec. 2266.

Rev. St. Sec. 1011, Comp. St., Sec. 1572.

Page et al vs. U. S. (9th Cir.) 278 Fed. 41.

Rose vs. U. S. (6th Cir.) 274 Fed. 245.

Waddel vs. U. S. (8th Cir.) 283 Fed. 409.

Laurie vs. U. S., 278 Fed. 934 (6th Cir.)

**Penn Casualty Company vs. Whiteway et al,
210 Fed. 782 (9th Cir.)**

ARGUMENT

(a) Appellant questions the sufficiency of the complaint in this case on the ground that C. W. Mossman does not sign the complaint in an official capacity. In the first place we think the contention is without merit for he has made the complaint as deputy marshal. In the very first paragraph (Record page 6) defendants are accused "by C. W. Mossman, Deputy United States Marshal for the Third Division for the Territory of Alaska." This is repeated in the verification, but assuming that he has not sufficiently

described himself, he has the same right as any other person to make complaint. Section 27 of the Alaska Dry Law makes it the duty of certain officials to enforce the Act, among them, of course, marshals and deputies, but nowhere can it be shown that they are given exclusive jurisdiction of making complaints, and unless they are given exclusive jurisdiction, anyone can make a complaint.

16 Corpus Juris, Page 289, Sec. 497, states that the rule that complaints may be made by any person is of long standing and further, on page 290 in the same section is the following language:

“But the mere fact that certain officers are authorized to make complaint does not necessarily give them the exclusive right to do so.”

In *People vs. Stickle*, Mich. 121 N. W. 498, a well considered case where defendant was convicted of wife desertion, it is contended that only the Superintendent of the poor could make the complaint, the court said:

“And the rule that one who is a competent witness and has knowledge of the facts may make complaint in a criminal case, permits the wife to be the complaining witness in this case. No good reason has been suggested for holding that because a superintendent of the poor or a county agent may make the com-

plaint, it was intended to give them the exclusive right to initiate proceedings.”

In *State vs. Howard N. H. 43 (Atla.) 592*, where defendant was charged with keeping a dog without a license in violation of a State Law, wherein the Mayor of each City and the selectmen of each town are required to make complaint against owners or keepers, it was contended that no other persons could make complaints, that the court held:

“Any person may make a complaint under Section 8 or kill an unlicensed dog under Section 11, but it is a special duty of the officers to whom warrants have been issued to do both and again it is the general policy of the laws that any person who has probable cause for believing that another has committed a crime shall be at liberty to make complaint against the defendant.”

For these reasons, that the complaint does show the signature of the officer, also that anyone can sign the complaint who knows the facts, we contend that the proposition is entirely without merit.

Under assignment I, 4th subdivision, appellant contends that the complaint does not state facts sufficient to constitute a cause of action. No defect is pointed out and, as stated before, this brief is being prepared upon the assignments of error alone and not upon appellant's brief.

Attention is called to the fact that this case is prosecuted under the Alaska Bone Dry Law, the first section of which declares:

“That on and after the first day of January, nineteen hundred and eighteen it shall be unlawful for any person * * * to have in his or its possession or to transport any intoxicating liquor unless the same was procured and is so possessed and transported as hereinafter provided.”

Another paragraph of the same section of the Act provides that the term liquor as used in this Act shall include whiskey, which the complaint in this case does; (Record page 6).

Section 18 of the Act declares:

“That it shall not be necessary in order to convict any person * * * of manufacturing, importing or selling alcoholic liquors to prove the actual manufacture, importing, sale, delivery of, or payment for any alcoholic liquors, but the evidence of having or keeping them in hand, stored or deposited, taking orders for, or offering to sell or barter, or exchanging them for goods or merchandise, or giving them away, shall be sufficient to convict.”

In *Millich vs. United States*, 282 Fed. 604, the case on appeal from the District Court of Alaska before this court, the count of the charge in regard to possession was in part that the defendants did, “in and on the premises known as Alaskan Cafe, adjoining the Alaskan Hotel on the west, and being on the north

side of Front Street, then and there knowingly, willfully, and unlawfully have in their possession certain intoxicating liquor, to wit, whiskey containing more than one-half of one per centum of alcohol by volume, the exact amount of said whiskey being unknown to the grand jurors."

This count, together with others of the indictment, was sustained against demurrer by this court and it will be noticed that the language is practically the same as that used in the complaint at bar, save that the specific premises where possession was had was not described, but the evidence shows that the possession was in an automobile, but such possession was charged to be in Knik Precinct, Territory of Alaska, which we believe sufficient.

(b) The Alaska Dry Law in Section I and all other parts of the Act specifically states that a violation of the provisions of the Act is a misdemeanor and in Section 28, which provides the machinery for prosecutions of violations of the Act, we find the following:

"Section 28. That prosecutions for violations of the provisions of this Act shall be on information filed by any such officer before any justice of the peace or district judge, or upon indictment by any grand jury of the Territory of Alaska, and said United States district attorney or his deputy shall file such information upon the presentation to him or his assistants of sworn information that the law has been violated;

and in such prosecutions anyone making a false oath to any material fact shall be deemed guilty of perjury.”

It seems, in view of the above provision and the long line of decisions interpreting statutes whose terminology is similar to that found in the Alaska Dry Law, that there is no doubt about the class of offense committed by a violation of the provisions of the Act, nor about the method of prosecuting such offenses. But plaintiff in error contends that error was committed in that he was tried under a criminal information and not by an indictment returned by a Grand Jury. The Supreme Court of the United States has long held that one convicted of a crime cannot be imprisoned in the penitentiary nor at hard labor unless the Act under which the prosecution is had specifically provides and authorizes that manner of imprisonment. This principle was laid down in the case of *In Re Mills*, 135 U. S. 263, where the court, page 270, says:

“A sentence simply of ‘imprisonment’ in the case of a person convicted of an offense against the United States—where the statute prescribing the punishment does not require that the accused shall be confined in the penitentiary—cannot be executed by confinement in a penitentiary, except in cases in which the sentence is for a period longer than one year.”

In the case of *In Re Bonner*, 151 U. S. 242, this principle is again laid down and *In Re Mills* cited with approval. On pages 254 and 255, the Court says:

“It follows that the court had no jurisdiction to order an imprisonment, when the place is not specified in the law, to be executed in a penitentiary when the imprisonment is not ordered for a period of longer than one year at hard labor.”

Section 2065, Compiled Laws of Alaska, 1913, defines a misdemeanor as a crime not punishable by death or by imprisonment in the penitentiary, and Section 336, Chap. 321 of the Act of March 4, 1909, (35 Stat. 1152) is to the same effect in that it defines a misdemeanor as a crime not punishable by death nor by imprisonment for a term exceeding one year, the statute reading as follows:

“All offenses which may be punished by death or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors.”

Indeed it seems to be the contention of plaintiff in error that a violation of the provisions of the Alaska Dry Law constitutes a felony or infamous crime, and, therefore, that the offender may be prosecuted only by the indictment of a grand jury, on the ground

that imprisonment under the Alaska Dry Law may be for a period exceeding one year. But the Act itself specifically and clearly states otherwise. Nowhere throughout the Act is a penalty of imprisonment for more than one year provided. So that appellant's contention seems to rest upon the supposition that where a sentence of imprisonment in jail for a term of one year is administered, and in addition to that a fine is assessed, that the total term of imprisonment might be more than a year in case the defendant should be imprisoned for the purpose of collecting the fine.

The courts of the United States have held uniformly in a long line of decisions that imprisonment because of non-payment of a fine is merely a method of enforcing the payment of the fine and constitutes no part of the penalty administered for the violation of the law.

In *Ex Parte McGee*, 54, Pac. 1091, the Supreme Court of Oregon held that imprisonment to enforce the payment of a fine is no part of the penalty itself, stating its decision in the following words:

“The imprisonment is merely a prescribed mode of enforcing the payment of the fine, and, as we have seen, constitutes a step in the code of criminal procedure to be pursued in all cases involving the im-

position of a fine. The punishment permitted by the charter and fixed by the ordinance is imprisonment or fine, or both. All beyond is mere mode or manner of enforcement. The first can only be satisfied by serving out the prescribed term in prison, while the latter may be satisfied by payment of the fine imposed; but for the coercion of that payment the statute has prescribed a mode of procedure, which is to commit the accused to prison for a term not exceeding one day for every two dollars of the fine. The mode and manner of enforcing the punishment should not be confounded with the punishment itself, or regarded as a part of it."

In a case brought under the National Prohibition Act this Court, in *Young vs. United States*, 272 Fed. 967, held that the offense charged was a misdemeanor and was rightfully prosecuted by information, holding that this is the established law of the Federal jurisdiction. And since then the Supreme Court of the United States in the case of *John H. Brede vs. James M. Powers*, decided, on October 22, 1923, No. 45, October Term, 1923, (not reported to date) that prosecutions under the National Prohibition Act may be brought by information, since the offense is not infamous, and since the Act itself authorizes prosecution by information.

It will be noticed that in the Brede case an offense under the National Prohibition Act was involved. Under that Act the punishment may, under some condi-

tions be imprisonment up to a period of five years.

The case at bar involves an offense under the Alaska Dry Law, which does not authorize imprisonment in a penitentiary nor at hard labor, and the Alaska Dry Law differs from the National Prohibition Act in respect to the length of possible imprisonment by making one year the maximum. This, it seems to us, brings the case at bar squarely within all the decisions holding that offenses under similar acts may be prosecuted by information.

(c) Constitutionality or Legality of the Alaska Dry Law.

Appellant in his first assignment of error claims Congress is without authority to pass legislation making the possession of intoxicating liquor an offense. This matter we think has been disposed of by this court, but we desire to call the attention of the court to the case of *Binns vs. United States*, 194 U. S. 490-1, as follows:

“It must be remembered that Congress, in the government of the Territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the constitution, that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the Territories.”

This is a case arising under the Act of Congress

imposing trade licenses on certain businesses from Alaska.

In *Simms vs. Simms*, 175 U. S. 168, involving an action for divorce for want of jurisdiction, the court said:

“In the Territories of the United States, Congress has the entire dominion and sovereignty, national, and local, Federal and state, and has full legislative power over all subjects upon which the legislature of a state might legislate within the state.”

In *Mormon Church vs. United States*, 136 U. S. 1-42, involving the abrogation of charter of the Mormon Church under Act of Congress, the court said:

“The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the Territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the Territory or other property belonging to the United States.”

National Bank vs. County of Yankton, 101 U. S., 129-132, involving the right of counties and townships under a Dakota Territorial Act to vote bonds. The court said:

“Their relation to the general government is much the same as that which counties bear to the respective states, and Congress may legislate for them as a state does for its municipal organizations.”

In the case of *Abbate vs. United States*, 270 Fed. 275, this court held the Bone Dry Law in force in the Territory of Alaska, the court saying:

“In enacting the Bone Dry Law * * * Congress was pursuing its policy of prohibition in Indian Territory.”

In *Koppitz vs. United States*, 272 Fed. 96, this court again upheld the Alaska Bone Dry Law and declared it in force.

As shown by the foregoing cases and many others Congress has plenary power to legislate upon all matters of government for a territory. If the contention be that they have not, then who has? Many territories and in fact almost all of them have been governed by congressional legislation for years after their acquisition and no legislature organized or authorized. If they did not have authority over this subject, then it would exist nowhere because Congress is the sole repository of legislative power in Territories. Certainly the organization of the legislature under Congressional law would not change the matter for the legislature derives no authority except that conferred by Congress.

As to constitutionality of such legislation, the foregoing cases show that this power has been settled and legislated upon by Congress for many years.

We therefore think the contention is without merit.

ADDENDUM

Since the preparation of this brief and after the same is in the hands of the printers the following information was received by wire from attorney for Plaintiff in Error:

“Will contend both cases: amendment National Prohibition Act November twenty-three, Nineteen Twenty One, supersedes Alaska Bone Dry Law.”

The phrase “both cases” above evidently refers to this case and to case No. 4147, also before this court, by the same appellant. The Amendment to the National Prohibition Act, approved November 23, 1921, is the “Act Supplemental to the National Prohibition Act,” commonly called the Anti-Beer Bill.

It is hard to see on what grounds it can be claimed that the Act Supplemental to the National Prohibition Act supersedes the Alaska Dry Law. Section I of the Amendment is a section of definitions. Section 2 of the Amendment provides that only spirituous and vinuous liquors may be prescribed for medicinal purposes, and relates to the conditions under which such may be shipped into the United States for non-beverage purposes. Section 3 applies the Amendment and the National Prohibition Act to the Territories, specifically mentioning Hawaii and the Virgin Islands, and

confers jurisdiction on their courts. Section 4 grants authority to the commissioner to formulate regulations to make the Amendment effective. Section 5 provides that all laws relating to the regulation and taxation of the traffic in intoxicating liquors that were existent at the time the National Prohibition Act was enacted shall continue in force and effect—unless the same are directly in conflict with that act or with the Amendment. Section 6 provides penalties for illegal searches in certain cases, etc.

Since the Alaska Dry Law itself provided only for the use of “pure alcohol” for “scientific, artistic or mechanical purposes or for compounding or preparing medicines,” (Sections 2, 3, 4, 5, 6, 7, 10, 11, 12, Alaska Dry Law) and “wine for sacramental purposes,” (Sections 8 and 9, Alaska Dry Law) and, hence, by its terms, exclusions and prohibitions made prescribing beer for medicinal purposes illegal, it is quite evident that the principal purpose of the Supplemental Act can have no repealing effect on the Alaska Dry Law.

If, by some stretch of imagination, Section 3 of the Amendment is claimed to effect the validity of the Alaska Dry Law, we contend that the answer is obvious. It has never been questioned that the National Prohibition Act applied to Alaska. It was con-

tended in *Abbate vs. U. S.*, 270 Fed. 735, and in *Kopitz vs. U. S.*, 272 Fed. 96, that the Alaska Dry Law was repealed by the National Prohibition Act, but it was never maintained that the National Act did not apply to the Territory of Alaska. This court in deciding those two cases not only held that the Alaska Dry Law was not repealed by the National Prohibition Act and is, therefore, still in effect, but held distinctly that **both** laws are in effect in Alaska. So that Section 3 of the Act Supplemental to the National Prohibition Act in specifically applying the Volstead Act to Hawaii and the Virgin Islands and "all territory subject to its (the United States') jurisdiction" could not possibly bring the Alaska Dry Law and the National Prohibition Act into any new relationship or conflict whereby the Alaska Dry Law is superseded by the latter.

Section 5 of the Amendment was passed specifically for the purpose of providing that certain laws were NOT REPEALED by the National Prohibition Act and has reference especially to certain Internal Revenue Laws which some of the courts had held were repealed by the National Prohibition Act. The Alaska Dry Law contained no such tax provisions, hence no new construction is needed on that score.

Section 6 provides penalties for searching a private

dwelling without a warrant, making malicious searches, and for impersonating an officer of the United States. If there were anything in the Alaska Dry Law contrary to that provision, the repealing effect of the Amendment would, under the holding of this court in *Abbate vs. United States*, supra, extend only to the inconsistency or direct conflict. But we hold that there is absolutely no conflict or inconsistency.

Certainly Sections 1 and 4 cannot be claimed to have any repealing effect on the Alaska Dry Law, hence we contend that appellant's contention is entirely without merit.

II.

(a) Error in Admission of Evidence.

Admissability of liquor without search.

Error is assigned upon the action of the trial court in admitting the liquor which had been seized, in evidence, without a search warrant and allowing the witness to testify regarding same. The claim is urged under the fourth and fifth amendments to the constitution. As the court well knows the question to be determined is whether the search is an unreasonable one. There is no guarantee in either the fourth or fifth amendments against searches of vehicles, either reasonable or unreasonable, the protection afforded be-

ing given to persons and houses, papers and effects. It was for the court below and for this court here to determine whether the search was an unreasonable one in view of all the facts and evidence. The evidence shows that the officers in an automobile met Peterson and Maelhorn in an automobile in the day time in a narrow road within Anchorage townsite (Record page 27, 34 and 41). It was impossible for either car to pass and the officers got out and went up to defendants car and said to Peterson, "what have you got Chauncey?" He said, "I have a load." Looking into the car they saw the kegs (Record pages 28, 29, 35 and 44). Whereupon Peterson was arrested and taken to jail, together with the kegs, there being eight 10-gallon kegs and three 5-gallon kegs filled with whiskey (Record page 31.) It will thus be seen with such a load in the rear end of a car it would be easily visible.

The question, as stated before, is a judicial one as to whether the obtaining of the evidence was reasonable. It will be seen that there was primarily no search as it is unnecessary to search for a thing which is in plain sight. This was the view held by the lower court and is sustained by the following cases decided in the district courts in this circuit and in this court:

Attention of the court is also called to the testimony of the defendant Clinton Maelhorn who was with Peterson at the time (Record page 48, 49, 50 and 51). Maelhorn took the stand on defense and made no claim whatever that the liquor was concealed from sight or secreted, nor did he deny the existence of the liquor nor the possession of same, either for himself or Peterson.

In United States vs. Fenton, 268 Fed. 221, from the District of Montana, which was a charge of transporting in an automobile, the court says:

“An unlawful arrest of an offender does not work a pardon in his behalf, and seizure without process and by force of government property, of which it is entitled to immediate possession, does not entitle the offender to a return of the property, nor to exclusion of its use in evidence against him. The auto and whiskey, by virtue of the National Prohibition Act (41 Stat. 305), were forfeited, and thereby transferred to the United States, the moment defendants embarked upon the unlawful transportation. The United States was then vested with the right of property and possession. Even as any other owner of property in like circumstances at common law, the United States without process could recover possession by force. And however, if at all, irregularly the officers proceeded, the defendants have no right to return of the property, nor to object to its use in evidence, whatever other, if any, right or remedy they may have.”

In Lambert vs. United States, 282 Fed. 413, the

case of transporting in an automobile. In this case the court says:

“The prohibition of the Fourth Amendment is against all unreasonable searches and seizures. Whether such search or seizure is or is not unreasonable must necessarily be determined according to the facts and circumstances of the particular case. We think the actions of the plaintiff in error in the present case, as disclosed by the testimony of Edison, were of themselves enough to justify the officers in believing that Lambert was at the time actually engaged in the commission of the crime defined and denounced by the National Prohibition Act, and that they were therefore justified in arresting him and in seizing the automobile by means of which he was committing the offense—just as peace officers may lawfully arrest thugs and burglars, when their actions are such as to reasonably lead the officer to believe that they are actually engaged in a criminal act, without giving the criminals time and opportunity to escape while the officers go away to make application for a warrant.”

In *United States vs. Bateman*, 278 Fed. 231, where an auto was stopped without a warrant, and on a motion for return of the property seized, the court held:

“It is my opinion, therefore, that it is not unreasonable for a prohibition officer to stop automobiles upon the public highway and search them for intoxicating liquors without a warrant, and the finding of the liquor justifies the search.”

In *United States vs. Vature*, 292 Fed. 492 on motion for return of liquor seized without warrant and to

quash information, the district court for the Northern District of California, S. D., in a well considered case denied the motion. In the above case the defendant was driving along the street with the liquor well concealed in his auto, according to the testimony of the defendant. The government contended that the liquor was in sight. The court, in denying the motion for return of the liquor used the following language:

“The Fourth Amendment affords inviolable protection to the people with respect to ‘their persons, houses, papers and effects, against unreasonable searches and seizures.’ What is an ‘unreasonable’ search or seizure is always a judicial question (United States vs. Bateman (D. C.) 278 Fed. 231, 232, and is determinable from a consideration of the circumstances involved. Officers of the government act under legal authority, in pursuance of oath and official station, and it will be presumed, in the absence of countervailing proof, that they have performed their duty—that is, that they have not been guilty, in a given instance, of making an unreasonable search or effecting an unreasonable seizure. The burden of showing the contrary, then, is upon him who contends to the contrary.”

We contend that it is apparent from the evidence of the government that kegs of whiskey were in plain sight of the officers and they were justified in seizing it, being a crime committed in their presence.

If it is contended by appellant that by concealing li-

quor in an automobile an officer is not justified in seizing same when he sees it, then indeed the enforcement of the liquor law is exceedingly difficult, if not impossible, so far as transportation is concerned. It would appear that where an officer under the like circumstance of this case meets another in a road where passage is difficult and he sees the liquor in the automobile, he would be derelict not to seize it, and would fail to perform his duty. We think the contention of defendant should not prevail.

The court's attention is directed to the fact that this is a prosecution, not under the Volstead Act, but under the Alaska Bone Dry Law. The attention of the court is further invited to the fact that the record fails to disclose any petition for the return of the liquor made either before or at the time of trial and it is our contention that the objection, if valid, came too late, since the court will not turn aside from the trial of a case to inquire into a collateral issue.

(b) Error is assigned because the court allowed the witness Mossman to testify concerning statements made by the defendants Peterson and Maelhorn (Record pages 37, 38, 39 and 29). The witness testified in substance that when he first approached the defendant's car he asked, "what have you got Chauncey," in reply to which the defendant stated, "I have

a load." The defendant was not at that time under arrest (Record page 29). Later and during the trip from the place of arrest to the jail the defendant Maelhorn, according to the testimony of the witness Mossman jocularly remarked (Record page 39) that "people who played with fire get burnt." Attention is called to the fact that this testimony was by the defendant Maelhorn and in no way bound the appellant and did not refer to the appellant directly, and we contend, not indirectly. But assuming that the statement referred to included Peterson we maintain that its admission was proper and not error.

In the case of *Perovich vs. United States*, 205 U. S. 91, passing upon the same question in a homicide case, the court says:

"Again, it is alleged that there was error in overruling a motion made by defendant to strike out all the testimony given by a deputy marshal of conversations between him and the defendant. As these conversations were not induced by duress, intimidation or other improper influences, but were perfectly voluntary, there is no reason why they should not have been received."

In *Wilson vs. United States*, 162 U. S. 623, also a homicide case this question was considered at much greater length than in the case quoted above, and the same conclusion reached, the court saying:

“In the case at bar defendant was not put under oath, and made no objection to answering the questions propounded. The commissioner testified that the statement was made freely and voluntarily, and no evidence to the contrary was adduced. Nor did defendant when testifying on his own behalf testify to the contrary. He testified merely that the commissioner examined him ‘without giving him the benefit of counsel or warning him of his right of being represented by counsel, or in any way informing him of his right of being represented by counsel, or in any way informing him of his right to be thus represented.’ He did not testify that he did not know that he had a right to be thus represented.’ He did not testify that he did not know that he had a right to refuse to answer the questions, or that, if he had known it, he would not have answered. His answers were explanations, and he appeared not to be unwilling to avail himself of that mode of averting suspicion. It is true that, while he was not sworn, he made the statements before a commissioner who was investigating a charge against him, as he was informed; he was in custody but not in irons; there had been threats of mobbing him the night before the examination; he did not have the aid of counsel; and he was not warned that the statement might be used against him or advised that he need not answer. These were matters which went to the weight or credibility of what he said of an incriminating character, but as he was not confessing guilt but the contrary, we think that, under all the circumstances disclosed, they were not of themselves sufficient to require his answers to be excluded on the ground of being involuntary as matter of law.”

Mangum vs. United States, 289 Fed. 213 is a case decided by this court, the principle question under

consideration being the admisability of statements made by the defendant. The rule laid down is the same as was announced in the preceding cases, but in addition to that we desire to call the court's attention to the following statement:

“But where on the trial of a criminal case a confession of the defendant is offered in evidence it becomes necessary for the trial court to ascertain and determine as a preliminary question of fact, whether it was freely and voluntarily made, and whether the previous undue influence, if any, had ceased to operate upon the mind of the defendant. In doing so, the court is necessarily vested with a very large discretion, which will not be disturbed on appeal, unless a clear abuse thereof is shown. *State vs. Rogoway*, 45 Or. 601, 78 Pac. 987, 81 Pac. 234, 2 Ann. Cas. 431; *State vs. Squires*, 48 N. H. 364.”

The evidence in the case at bar shows conclusively that the statements admitted in testimony were voluntarily made by the defendants and that no duress, intimidation or promises were in any way responsible for them. We therefore contend that the objection to their admission was entirely without merit.

(c) Admisability of testimony concerning ownership of automobile.

The third assignment of error goes to the testimony of the witness Mossman in regard to the ownership of the automobile. Defendant objected to such testimony

on the ground that it called for a conclusion. This the court overruled, stating that witness might answer if he knew (Record page 29). The testimony in question called for a statement of fact and was admissible. The court's attention is directed to the statement of witness Watson (Record page 37) in which the same question was put to this witness and no objection made to its admissibility on the ground raised in the third assignment of error. It is our contention that the objection to the testimony is without merit and the testimony itself admissible as being evidence on material question of fact.

III.

Sufficiency of Evidence.

Defendant in his twelfth assignment, claims error because the court refused to direct a verdict of not guilty in favor of defendants on the ground that the evidence was insufficient. Attention is called to the fact that eight 10-gallon and three 5-gallon kegs of whiskey were found in possession of defendant (Record page 31, 35); that the kegs contained whiskey, none of which facts appellant's co-defendant, Maelhorn, who took the stand, attempted to deny. The court below, having heard the case and the motion

in arrest of judgment and knowing the evidence, refused either to direct a verdict or to arrest judgment. The evidence being brief, covering but a few pages, it is quickly read and we believe shows conclusively a sufficient foundation upon which to rest the verdict and the judgment.

CONCLUSION

For the reasons above stated we respectfully request this Honorable Court to deny the petition and to sustain the judgment of the lower Court.

Respectfully submitted,

SHERMAN DUGGAN,
United States Attorney.

HARRY G. McCAIN,
Assistant United States Attorney,
Third Division, Territory of Alaska.

United States
Circuit Court of Appeals
For the Ninth Circuit.

C. F. PETERSON,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the Territory of Alaska,
Third Division.

United States
Circuit Court of Appeals
For the Ninth Circuit.

C. F. PETERSON,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the Territory of Alaska,
Third Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

SHERMAN DUGGAN, United States Attorney,
and His Assistants, H. G. McCAIN, of Cordova,
Alaska, and JULIEN A. HURLEY, of Anchor-
age, Alaska,

Attorneys for Plaintiff and Defendant in
Error.

L. V. RAY, of Seward, Alaska,

Attorney for Defendant and Plaintiff in
Error. [1*]

In the District Court for the Territory of Alaska,
Third Division.

No. 881—CRIMINAL.

UNITED STATES OF AMERICA

vs.

C. F. PETERSON,

Defendant.

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare, authenticate and certify for filing in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, upon the writ of error heretofore issued in the above-entitled cause, the following papers, pleadings and records on file in said case, to wit:

*Page-number appearing at foot of page of original certified Transcript of Record.

1. This praecipe.
2. Bill of exceptions.
3. Order settling and certifying bill of exceptions,
4. Assignment of errors.
5. Petition for writ of error.
6. Order allowing writ of error and fixing amount of bond, which shall act as a supersedeas.
7. Appearance bond upon writ of error (approved).
8. Cost bond upon writ of error (approved).
9. Writ of error.
10. Citation on writ of error (original).
11. Citation on writ of error (served copy).

Dated at Valdez, Alaska, this 2d day of November, 1923.

L. V. RAY,

Attorney for Defendant.

Filed in the District Court, Territory of Alaska, Third Division. Nov. 2, 1923. W. N. Cuddy, Clerk. By ———, Deputy. [2]

In the District Court for the Territory of Alaska,
Third Division.

No. 881—CRIMINAL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. F. PETERSON,

Defendant.

Notice of Presentation of Bill of Exceptions for Settlement and Certification.

To Honorable SHERMAN DUGGAN, United States Attorney for the Territory of Alaska, Third Division:

PLEASE TAKE NOTICE that the undersigned, as attorney for the defendant C. F. Peterson, will on the 24th day of February, 1923, at the hour of ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, present to the Court for settlement and certification the defendant's bill of exceptions in the above-entitled case, a copy of which proposed bill of exceptions is hereto attached and herewith served upon you.

Dated at Valdez, Alaska, this 17 day of February, 1923.

L. V. RAY,
Attorney for the Defendant.

Service of a true copy of the above notice of presentation of bill of exceptions for settlement and certification acknowledged this 19 day of February, 1923.

SHERMAN DUGGAN,
United States Attorney. [3]

In the District Court for the Territory of Alaska,
Third Division.

No. 881—CRIMINAL.

UNITED STATES OF AMERICA

vs.

C. F. PETERSON,

Defendant.

Bill of Exceptions.

Comes now the above-named defendant and being about to prosecute to the United States Circuit Court of Appeals for the Ninth Circuit a writ of error upon the judgment made and entered by the above-named District Court on the 15th day of December, 1922, prays an order of said District Court, or of the Honorable E. E. Ritchie, Judge thereof, who presided at the trial of said cause and who made and entered said judgment aforesaid, that this bill of exceptions containing the following-named papers, pleadings, proceedings and exceptions in said cause, be filed, settled and certified to as said defendant's bill of exceptions upon said writ of error, to wit:

1. Complaint.
2. Warrant.
3. Transcript docket entries Justice's Court containing judgment and sentence therein.
4. Notice of appeal.
5. Undertaking on appeal.
6. Certificate of Justice.

7. Plea in bar, affidavit in support thereof.
8. Minute order denying plea in bar (in transcript).
9. Transcript of testimony and proceedings at trial.
10. Verdict.
11. Motion in arrest of judgment.
12. Minute order denying motion in arrest of judgment.
13. Judgment and sentence.
14. Bail bond pending writ of error.

True, full and correct copies of all of said papers, pleadings, proceedings and exceptions are hereto attached, and are, by reference herein, inserted in this bill of exceptions.

The defendant prays that the judgment and sentence of said District Court rendered and pronounced against him on December 15th, 1922, in said cause, may be reversed.

Dated at Seward, Alaska, this 17 day of February, 1923.

L. V. RAY,
Attorney for Defendant. [4]

In the United States Commissioner's Court for
Knik Precinct, Third Division, Territory of
Alaska.

No. 1003.

UNITED STATES OF AMERICA

vs.

C. F. PETERSON.

**Complaint for the Violation of the Act of Congress,
Approved February 14th, 1917, Known as the
Alaska Dry Law.**

(Filed Sept. 21, 1922.)

C. F. Peterson is accused by C. W. Mossman, Deputy United States Marshal, in this complaint of the crime of having intoxicating liquor in his possession, committed as follows:

The said C. F. Peterson, on the 21st day of September, A. D. 1922, in Knik Precinct, in the Territory of Alaska, and within the jurisdiction of this Court, then and there being, did then and there wilfully and unlawfully have in his possession intoxicating liquor, to wit, whiskey, commonly called "white mule," in violation of the provisions of the Act of Congress, approved February 14th, 1917, commonly known as the Alaska Dry Law, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

(Signed) C. W. MOSSMAN.

United States of America,
Territory of Alaska,—ss.

I, C. W. Mossman, being first duly sworn, upon oath depose and say that the foregoing complaint is true; and that I am a deputy United States marshal for the Third Division of the Territory of Alaska.

(Signed) C. W. MOSSMAN.

Subscribed and sworn to before me this 21st day of Sept., 1922.

[Seal]

(Signed) W. H. RAGER,

U. S. Commissioner and *Ex-Officio* Justice of the Peace. [5]

In the United States Commissioner's Court for the Territory of Alaska, Third Division, at Anchorage.

United States of America,
Territory of Alaska,—ss.

Filed Sept. 21, 1922.

The President of the United States of America to the Marshal of the Third Division, of the Territory of Alaska, or His Deputy, GREETING.

We command you to apprehend forthwith C. F. Peterson, who is named in a complaint made on oath before me this 21st day of September, A. D. 1922, by C. W. Mossman, if he be found in said District for the crime of having intoxicating liquor in his possession as is more particularly set forth in said complaint and bring him before me to answer said complaint, and be further dealt with as the law directs.

HEREOF FAIL NOT, and make return of this writ with your doings thereon.

Given under my hand and seal at Anchorage this 21st day of September, 1922.

[Seal]

W. H. RAGER,

United States Commissioner and *Ex-Officio* Justice of the Peace. [6]

In Commissioner's Court, Third Division, Territory
of Alaska, at Anchorage.

Before W. H. RAGER, Commissioner and *Ex-
Officio* Justice of the Peace.

No. 1003.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
C. F. PETERSON,
Defendant.

JULIAN A. HURLEY, Attorney for Plaintiff.

L. V. RAY, Attorney for Defendant.

Sept. 21, 1922. Complaint in writing verified by
C. W. Mossman charging above-
named defendant with the crime
of having intoxicating liquor in
his possession. Filed.

Sept. 21, 1922. Warrant of arrest issued and deliv-
ered to U. S. Marshal for execu-
tion.

Sept. 21, 1922. Marshal returned said warrant of
arrest endorsed as follows:

"The within writ came to hand
September 21, 1922; I executed
same by arrest of within named
defendant and now produce him
in court.

H. P. SULLIVAN,
U. S. Marshal.

By C. W. Mossman,
Deputy."

- Sept. 21, 1922. Defendant in court—Complaint read to defendant. Defendant put in his plea of “Not guilty.”
- Sept. 21, 1922. Bail bond in sum of \$1,000.00. Sureties Z. J. Loussac and George Valaer approved and filed.
- Sept. 21, 1922. By agreement case set for trial September 27, 1922, at 10 A. M.
- Sept. 27, 1922. All parties present in court, including defendant, a jury having been waived, and the case being tried without a jury, before the Court. Witnesses on part of the Government, C. W. Mossman and A. F. Hoffman sworn and testified.

After hearing the evidence in the case and being fully advised in the premises, the Court finds that said C. F. Peterson has been proven guilty of the crime charged in said complaint, and the Court adjudged said defendant guilty of the crime charged in said complaint, to wit: Crime of having intoxicating liquor in his possession, the Court did then and there render and enter judgment of conviction as follows:

[7]

“The above-named defendant, C. F. Peterson, having been

brought before me, W. H. Rager, Commissioner and *Ex-Officio* Justice of the Peace in a Criminal Action, for the crime of having intoxicating liquor in his possession, in violating of Act of Congress, approved February 14, 1917, and the said C. F. Peterson having thereupon pleaded 'Not guilty' and duly tried by me, and upon such trial duly convicted, I have adjudged that said C. F. Peterson be imprisoned in the Federal Jail at Anchorage, Alaska, for a period of One (1) Year and that he pay a fine of One Thousand Dollars (\$1000.00) and further that said C. F. Peterson be imprisoned in the Federal Jail at Anchorage, Alaska, until such fine be satisfied, said imprisonment not to exceed one (1) day for every Two Dollars (\$2.00) of such fine, and that said C. F. Peterson serve one day for every Two Dollars of such fine of \$1000.00 that he shall fail or refuse to pay and being in addition to said imprisonment of one year.

Done in open court, this 27th
day of September, 1922.

[Seal] W. H. RAGER,
Commissioner and *Ex-Officio* Jus-
tice of the Peace."

Sept. 30, 1922. Notice of appeal.

Sept. 30, 1922. Undertaking on appeal, sum of
\$1500.00. Sureties H. M. Evans
and Matt Raich approved and
filed. [8]

In the Justice's Court for the Territory of Alaska,
Third Division, Knik Precinct, at Anchorage.

No. A. 1003.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

C. F. PETERSON,
Defendant.

Notice of Appeal.

(Filed Sept. 30, 1922.)

To the UNITED STATES OF AMERICA, the
Plaintiff in the Above-entitled Action, and to
the United States District Attorney for Third
Judicial Division, Territory of Alaska, or Any
of His Assistants, and to J. A. HURLEY, As-
sistant United States District Attorney at
Anchorage, Alaska, and to the Hon. W. H.
RAGER, Justice of the Above-styled Court.

You and each of you will please take notice, that C. F. Peterson, the defendant is the above-entitled action, hereby appeals to the District Court for the Territory of Alaska, Third Division, from the judgment of conviction therein made and entered in the Justice's Court for the Territory of Alaska, Third Division, Knik Precinct, at Anchorage, before the Hon. W. H. Rager, United States Commissioner and *Ex-Officio* Justice of the Peace, on Wednesday, 27th day of September, A. D. 1922, in favor of the plaintiff, United States of America, and against the above-named defendant, C. F. Peterson, and from the whole thereof.

Said judgment of conviction by the Hon. W. H. Rager being that the said defendant C. F. Peterson, be confined and serve one year in the federal jail at Anchorage, Alaska, and also to pay a fine of One Thousand Dollars (\$1000.00) and in lieu of and failure to pay such fine to serve one day for every Two Dollars of such fine until the same is satisfied for the crime of having intoxicating liquor in his possession at Anchorage, Alaska, on the 21st day of September, 1922, and being in violation of the Act known as "An Act to prohibit the manufacture or sale of alcoholic liquors in the Territory [9] of Alaska and for other purposes" and approved February 14th, 1917, said Act being commonly known as the Alaska Bone Dry Law, said defendant having been tried by the Court on the 27th day of September, 1922, and found defendant guilty as charged. Said judgment hereby appealed from being in words and figures to wit:

The above-named defendant C. F. Peterson having been brought before me, W. H. Rager, Commissioner and *Ex-Officio* Justice of the Peace, in a criminal action for the crime of having intoxicating liquor in his possession in violation of the Act of Congress approved Feb. 14, 1917, and the said C. F. Peterson having thereupon pleaded "Not guilty" and been duly tried by me and upon such trial duly convicted, I have adjudged that the said C. F. Peterson be imprisoned in the federal jail in Anchorage, Alaska, for a period of one (1) year and that he pay a fine of One Thousand Dollars (\$1000.00) and further that said C. F. Peterson be imprisoned in the federal jail until such fine be satisfied, said imprisonment not to exceed one (1) day for every Two Dollars (\$2.00) of such fine and that said C. F. Peterson serve one day for every Two Dollars (\$2.00) of such fine of \$1000.00 that he shall fail or refuse to pay and being in addition to said imprisonment of one year.

Done in open court this 27th day of September, 1922.

[Seal]

W. H. RAGER,
Commissioner and *Ex-Officio* Justice of the Peace.

Said judgment being entered in Criminal Docket No. 4, page 206, in the above-styled court, and being Cause No. 1003.

The defendant C. F. Peterson, by order of the Court, having appeared for sentence on the 27th day of September, 1922, was sentenced as above set out by the Hon. W. H. Rager, the Justice above

named and before whom the trial of the case was had. [10]

This appeal is taken on question of both law and fact.

Dated at Anchorage, Alaska, this 30th day of Sept., 1922.

RAY and DAVID,
Attorneys for Defendant, Anchorage, Alaska.

Service of the above and foregoing notice of appeals admitted and accepted by true copy this 30th day of Sept., 1922.

SHERMAN DUGGAN,
U. S. District Attorney, Third Division, Territory of Alaska.

By JULIEN A. HURLEY,
Assistant U. S. District Attorney, Third Division,
Territory of Alaska. [11]

In the Justice's Court for the Territory of Alaska,
Third Division, Knik Precinct.

No. A. 1003.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
C. F. PETERSON,
Defendant.

Undertaking on Appeal.

Filed Sept. 30, 1922.

The above-entitled cause having been tried on the 27th day of September, 1922, and the above-named defendant C. F. Peterson having been found guilty

as charged in the Justice's Court, Knik Precinct, Third Division, Territory of Alaska, at Anchorage, before Hon. Wm. H. Rager, Commissioner and *Ex-Officio* Justice of the Peace, and a judgment of conviction having been given on the 27th day of September, 1922, by the Hon. Wm. H. Rager, the Justice of the above-styled court, whereby the above-named defendant, C. F. Peterson was condemned to serve one (1) year in the federal jail at Anchorage, Alaska, and also to pay a fine of One Thousand Five Hundred Dollars (\$1,500.00) and in lieu of and failure to pay such fine serve one day for every two dollars of such fine until the same is satisfied for the crime of having intoxicating liquor in his possession on the 21st day of September, 1922, and being in violation of the Act known as "An Act to prohibit the manufacture or sale of alcoholic liquors in the Territory of Alaska, and for other purposes," and approved February 14, 1917, said Act commonly known as the Alaska Bone Dry Law. Said judgment hereby appealed from being in words and figures to wit:

The above-named defendant C. F. Peterson being brought before me, W. H. Rager, Commissioner and *Ex-Officio* Justice of the Peace, in a criminal action, for the crime of having intoxicating liquor in his possession in violation of [12] Act of Congress approved Feb. 14, 1917, and the said C. F. Peterson having thereupon plead "not guilty" and been duly tried by me and upon such trial duly convicted. I have ordered and adjudged that said defendant C. F. Peterson be imprisoned in the

federal jail at Anchorage, Alaska, for a period of One (1) year and that he pay a fine of One Thousand Five Hundred dollars (\$1500.00) and further that the said C. F. Peterson be imprisoned in the federal jail until such fine be satisfied, said imprisonment not to exceed one (1) day for every Two Dollars (\$2.00) of such fine and that said C. F. Peterson serve one day for every Two Dollars of such fine that he shall fail or refuse to pay and being in addition to said imprisonment of one year.

Done in open court this 27th day of September, 1922.

W. H. RAGER,

Commissioner and *Ex-Officio* Justice of the Peace.

Said defendant having appealed from said judgment rendered in the Justice's Court, Knik Precinct, Third Division, Territory of Alaska, before Hon. W. H. Rager, Commissioner and *Ex-Officio* Justice of the Peace, to the District Court for the Territory of Alaska, Third Division, and said C. F. Peterson, the above-named defendant having been admitted to bail in the sum of Fifteen Hundred Dollars (\$1500.00),—

NOW, THEREFORE, I, C. F. Peterson, as principal, and H. M. Evans, as resident of Anchorage, Alaska, by occupation a painter, and Matt Raich, a resident of Anchorage, Alaska, by occupation a merchant, as sureties, do hereby undertake that the above-named defendant C. F. Peterson, shall in all respects abide and perform the orders and judgment of the Appellate Court under appeal,

or if he fail to do so in any particular, that we will pay to the United States the sum of Fifteen Hundred Dollars (\$1500.00). [13] We further undertake that the appellant will also pay to the United States all costs and disbursements that may be awarded against him on appeal.

Dated and sealed at Anchorage, Alaska, this 30th day of September, 1922.

| | |
|-----------------|------------|
| C. F. PETERSON, | (Seal) |
| | Principal. |
| H. M. EVANS, | (Seal) |
| | Surety. |
| MATT RAICH, | (Seal) |
| | Surety. |

United States of America,
Territory of Alaska,—ss.

H. M. Evans and Matt Raich, as sureties named in the foregoing undertaking, being first duly sworn each for himself and not one for the other deposes and says that he signed the foregoing instrument and undertaking; that he is a resident of the Territory of Alaska, that he is not a counsellor or attorney at law, marshal, clerk of the court or officer of any court, that he is worth the sum specified in the undertaking exclusive of property exempt from execution, over and above all his just debts and liabilities.

H. M. EVANS.
MATT RAICH.

Subscribed and sworn to before me this 30th day of Sept., 1922.

[Seal]

W. H. RAGER,
Commissioner and *Ex-Officio* Justice of Peace, Knik
Precinct at Anchorage.

Taken and acknowledged before me and approved this 30th day of Sept., 1922.

[Seal]

W. H. RAGER,
Commissioner and *Ex-Officio* Justice of the Peace.
[14]

In Commissioner's Court, Third Division, Territory of Alaska, at Anchorage.

Before W. H. Rager, Commissioner and *Ex-Officio* Justice of the Peace.

No. 1003.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. F. PETERSON,

Defendant.

Certificate of Justice.

I HEREBY CERTIFY that the attached, consisting of two (2) pages, is a true and correct transcript of my docket, and contains a copy of all the material entries in my docket relating to said cause and appeal, and is a copy of my docket in the above-entitled action.

I also certify that the annexed and accompanying papers are all the original papers relating to said

cause and appeal and filed with me and being all the papers and pleadings filed in said cause as well as the notice of appeal and undertaking on appeal filed herein:

And for the purpose of identification I FURTHER CERTIFY that said attached papers in said cause and appeal are numbered (in ink) from 1 to 5, both inclusive.

Dated and signed at Anchorage, Alaska, this 30th day of September, A. D. 1922.

[Seal] W. H. RAGER,
Commissioner and *Ex-Officio* Justice of the Peace,
Knik Precinct, at Anchorage.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Sept. 30, 1922. W. N. Cuddy, Clerk. By Robt. S. Brograw, Deputy.
[15]

In the District Court of the Territory of Alaska,
Third Division.

No. 881—CRIMINAL.

UNITED STATES OF AMERICA

vs.

C. F. PETERSON.

Affidavit in Support of Plea in Bar.

United States of America,
Territory of Alaska,—ss.

C. F. Peterson, being duly sworn, on oath deposes and says: That he is the defendant in the above action; that defendant is charged in the complaint

on file in said cause with a violation of the provisions of the Alaska Bone Dry Law, so called, in that the said defendant is charged with unlawful possession of intoxicating liquors at or near Anchorage, Alaska, on September 21st, 1922; that judgment was rendered in Justice Court upon said complaint and that the above cause is on appeal from said judgment; that on said September 27th, 1922, at said Anchorage, Alaska, before W. H. Rager, Commissioner and *Ex-officio* Justice of the Peace, affiant was held to answer upon the charge of illegally transporting intoxicating liquors on the 21st day of September, 1922, and for the same liquors so alleged to be intoxicating as constituting the offense of unlawful possession, as aforesaid; that defendant gave bonds for his appearance before the next grand jury for the third division, Territory of Alaska, upon said charge of illegal transportation in violation of the provisions of the National Prohibition Act, all of which more fully appears from the records and files of the above-entitled court.

C. F. PETERSON.

Subscribed and sworn to before me this 28th day of November, A. D. 1922.

[Seal]

L. V. RAY,

Notary Public in and for the Territory of Alaska.

My commission expires March 24th, 1926.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 28th, 1922. W. N. Cuddy, Clerk. [16]

In the District Court for the Territory of Alaska,
Third Division.

No. 881—CRIMINAL.

UNITED STATES OF AMERICA

vs.

C. F. PETERSON,

Defendant.

Transcript of Evidence.

BE IT REMEMBERED, that the above-entitled cause came on duly and regularly to be heard on Tuesday, the 28th day of November, 1922, at Anchorage, in said Territory and Division, before the Honorable E. E. RITCHIE, Judge of said court, and a jury:

The Government being represented by Honorable Sherman Duggan, United States Attorney, and Julien Hurley, Assistant United States Attorney.

The defendant being represented by his attorney and counsel, L. V. Ray, Esq.

A jury having been empanelled opening statement was made by Mr. Hurley on behalf of the Government; counsel for defendant waiving statement in his behalf.

Whereupon the following additional proceedings were had and done, to wit: [17]

On November 27, 1922, in open court, the following proceedings were had and done:

The COURT.—I have given careful consideration to the defendant's motion for a change of venue

in this case and to the affidavits which have been filed, and I am convinced that he can get a fair trial here in Anchorage. The motion is denied.

Mr. RAY.—Defendant excepts to the action of the Court in denying his motion for change of venue and continuance as a gross abuse of discretion. Exception allowed.

On November 28, 1922, in open court, the following proceedings were had and done:

Mr. RAY.—Defendant Peterson pleads in bar to the complaint on which he is now placed on trial the records and files of this court showing that for the same offense, concerning the same amount of intoxicating liquor, alleged to have been committed at the same time, he is now bound over to the grand jury for violation of the Volstead Act on a felony charge; that the offense for which he is now about to be tried is a misdemeanor and it being the same overt act the felony charge merges the misdemeanor. The affidavit of the defendant Peterson in support of this plea reads as follows:

“In the District Court for the Territory of Alaska,
Third Division.

No. 881—CRIMINAL.

UNITED STATES OF AMERICA

vs.

C. F. PETERSON.

United States of America,
Territory of Alaska,—ss.

AFFIDAVIT IN SUPPORT OF PLEA IN BAR.

C. F. Peterson, being duly sworn, on oath deposes and says: That he is the defendant in the above action; [18] that defendant is charged in the complaint of file in said cause with a violation of the provisions of the Alaska Bone Dry Law, so called, in that the said defendant is charged with unlawful possession of intoxicating liquor at or near Anchorage, Alaska on September 21, 1922; that judgment was rendered in Justice Court upon said complaint and that the above cause is on appeal from said judgment; that on said September 27th, 1922, at said Anchorage, Alaska, before W. H. Rager, U. S. Commissioner and *Ex-officio* Justice of the Peace, affiant was held to answer upon the charge of illegally transporting intoxicating liquors on the 21st day of September, 1922, and for the same liquors so alleged to be intoxicating as constituting the offense of unlawful possession, as aforesaid; that defendant gave bonds for his appearance before the next grand jury for the Third Division, Territory of Alaska, upon said charge of illegal transportation in violation of the provisions of the National Prohibition Act, all of which more fully appears from the records and files of the above-entitled court.

(Signed) C. F. PETERSON.

Subscribed and sworn to before me this 28th day of November, A. D. 1922.

[Seal] (Signed) L. V. RAY,
Notary Public in and for the Territory of Alaska.
My commission expires March 24, 1926.

Filed in the District Court, Territory of Alaska,
Third Division. November 28, 1922. (Signed)
W. N. Cuddy, Clerk."

The COURT.—The plea is denied. The defendant has not yet been tried on the felony charged and I don't see how the fact of his being bound over can affect this charge now. Exception allowed defendant.

Testimony of Frank Hoffman, for the Government.

FRANK HOFFMAN, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HURLEY.)

Q. What is your name? A. Frank Hoffman.

Q. What official position do you hold?

A. Deputy U. S. Marshal, Third Division.

Q. Where are you located? A. Matanuska.

Mr. RAY.—Defendant objects to the introduction of any testimony of the witness, after being sworn and now on the stand, on ground that this Court is without jurisdiction to try the case on the complaint on file here; first, on the ground [19] that it is in violation of the rights of the defendant as guaranteed to him under the fifth amendment to the Constitution of the United States providing

(Testimony of Frank Hoffman.)

that no prosecution for a felony may be had except on the presentment of a grand jury; and, second, the complaint on which this charge is based is signed "C. W. Mossman," not "C. W. Mossman, deputy marshal," and is, therefore, invalid.

In view of the provisions of sec. 1891, R. S., that "The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States" it is our contention that the Alaska Bone Dry Law being a statute of the United States, and the term of imprisonment on a conviction under it may be more than one year, that a case can only be tried after presentment and indictment by a grand jury. I also desire to renew again the plea in abatement which I filed this morning; that the records and files of this Court show that for this same offense, with reference to the same intoxicating liquor, this man is now being held to answer before the grand jury, and that the doctrine of merger should apply. I would just like to read from volume 16, C. J., section 10: "The merger of one offense in another occurs when the same criminal act constitutes both a felony and a misdemeanor. In such a case, at common law, the misdemeanor is merged in the felony, and the latter only is punishable. This doctrine applies only where the same criminal act constitutes both offenses, and where there is identity of time, place, and circumstances. More-

(Testimony of Frank Hoffman.)

over the offenses must be of different grades, and the rule does not apply where both offenses are felonious or misdemeanors." [20]

The COURT.—At this time I will deny the motion. While I think there is something in one point which Mr. Ray has raised I do not think it should be decided hastily and if I should be wrong in denying the motion at this time the same point can be raised on motion in arrest of judgment. As to the objection to the complaint, I think the description in the body of the complaint of C. W. Mossman, as a deputy United States marshal is sufficient. Defendant, allowed an exception.

Mr. HURLEY.—Were you deputy United States marshal for the Territory of Alaska, Third Division, on September 21, 1922? A. I was.

Q. How long have you been deputy U. S. marshal? A. Eight or nine years.

Q. Where were you on the 21 day of September, this year? A. Here in Anchorage.

Q. Where were you along about half-past six or seven on the morning of the 21 day of September?

A. On Fourth Avenue, Anchorage.

Q. Where did you go from there?

A. I went down to the dock.

Q. What did you do down there?

A. Why, we saw a boat coming on this side above the dock near a point about a mile up when we first saw it.

Q. Could you see there was anyone in it?

A. There was.

(Testimony of Frank Hoffman.)

Q. Did it land at the dock?

A. It landed at this end of the dock.

Q. How far were you from the dock when it landed? A. Quite a distance. [21]

Q. Could you identify any person in the boat at that time? A. No, sir.

Q. What, if anything, did the person in the boat do after it landed?

A. Went into the dock office and after a while came out and he swung out into the stream again and went on.

Q. Where did he go?

A. He went down the bay three or four miles and landed down there.

Q. Did you see the boat land? A. I did.

Q. Who was with you?

A. Mr. Mossman, Mr. Watson and myself.

Q. What did you do when you saw the boat land?

A. We went down there.

Q. What did you do?

A. We went and watched the boat land. Then after the boat landed this party, whoever it was, we saw him make two or three trips to the shore, and we knew he couldn't get away so we went down there and found Chauncey Peterson and the boat; Chauncey was down there on the bank asleep.

Mr. RAY.—Had you a search-warrant when you went down there?

The WITNESS.—We did not.

Mr. RAY.—The defendant objects to the introduction of any further testimony of the witness as

(Testimony of Frank Hoffman.)

to the defendant or the boat on the ground that such evidence attempted to be offered is in plain violation of the constitutional rights of the defendant guaranteed him under the fourth and fifth amendments to the Constitution of the United States.

The COURT.—Objection overruled. Exception allowed. [22]

Mr. HURLEY.—Where was the boat when you got down there?

A. It was lying on the beach, high and dry.

Q. How far were you from it before you first could see it after starting down the beach?

A. There was part of the time we couldn't see it. Just about a mile we had to go through the woods.

Q. The rest of the time you could see? A. Yes.

Q. Did you go up to the boat?

A. Yes, after we found Mr. Peterson there.

Q. You saw him first before going down to the boat? A. Yes, sir.

Q. What was he doing when you first saw him?

A. He was asleep.

Q. And was Mr. Mossman and Mr. Watson with you when you first saw Mr. Peterson there?

A. Yes, sir.

Q. Did you and Mr. Mossman and Mr. Watson all go to the boat together?

A. No, Mr. Watson stayed there on the hill, on the bank.

Q. What did you see in the boat?

A. Its an open boat—a dory—and there were

(Testimony of Frank Hoffman.)

some kegs. They were not all covered; some were not covered. We found ten ten-gallon kegs of white mule.

Q. Was there anything in the boat outside the whiskey?

A. Oh, odds and ends, you see, and on the beach there he was cooking. There was a shotgun and he had an Evinrude engine on the boat.

Q. Have you ever examined any of the whisky you found in the boat?

A. We did at that time. [23]

Q. What did you do with it?

A. We brought it into town. We waited around till the tide got right and then Watson, Peterson and myself got the boat off and we came into town in it.

Q. Have you that liquor here? A. Yes, sir.

Q. Will you produce it? A. Yes, sir.

Q. I call your attention to these kegs that have just been brought into court and ask you what they are?

A. Nine of them are white mule and the other is empty—it broke.

Q. Was the empty one full when you started with it from the boat? A. It was.

Q. And when was it emptied?

A. While we were loading it on the truck it rolled off and spilled all over the sidewalk.

Q. And are those the kegs and contents you got on the boat? A. Yes.

Q. Now what do they contain?

(Testimony of Frank Hoffman.)

A. White mule.

Q. Is that an intoxicating liquor? A. It is.

Mr. HURLEY.—We offer in evidence the nine or ten kegs with their contents.

Mr. RAY.—The defendant makes the same objection.

The COURT.—They will be admitted.

Ten kegs and contents admitted in evidence and marked Plaintiff's Exhibits "A" to "J," inclusive.

Mr. HURLEY.—If the Court please, at this time I would like to pour out some of the contents and let the jurors examine it.

Mr. RAY.—The defendant objects to the liquid being passed around to the jurors; it makes them witnesses.

The COURT.—Objection overruled. Exception allowed. [24]

Q. I believe you stated that Mr. Watson stayed with Mr. Peterson and you and Mr. Mossman went to the boat? A. Yes, sir.

Q. And how far were Mr. Peterson and Mr. Watson from the boat when you went with Mr. Mossman down to the boat?

A. About sixty feet, more or less. From the boat do you mean?

Q. Yes.

A. Not more than sixty feet, a short distance.

Q. When you and Mr. Mossman came back to where Mr. Peterson and Mr. Watson were had you any conversation there with Peterson at that time?

A. Yes.

(Testimony of Frank Hoffman.)

Q. What was said by Mr. Peterson and you at that time?

Mr. RAY.—We object to any conversation had by the defendant and officers at that time.

The COURT.—You may find out whether he was under arrest at the time or whether he made a voluntary statement.

Mr. RAY.—Was Peterson under arrest at the time of your conversation with him?

The WITNESS.—Yes, I think so.

Q. Did you tell him that you would testify as to anything he might say? A. I did not.

Q. Did you advise him that whatever he said would be used against him on the trial of the case?

A. It was a general conversation.

Q. At no time did you yourself tell him that anything you say might be used against you at the trial of the case?

A. No, sir; nothing like that was said.

Mr. RAY.—We object to the conversation. [25]

The COURT.—Did you offer him any inducement of any kind or try to persuade him to talk.

A. His conversation was voluntary.

The COURT.—The objection is overruled. Exception allowed.

A. He just told us he had been out in the boat all night fighting this Evinrude engine and was all in.

Q. Did this boat have an Evinrude engine?

A. Yes, sir.

Mr. HURLEY.—That is all.

Mr. RAY.—We ask that the witness Hoffman's

(Testimony of Frank Hoffman.)

testimony be stricken on the ground that the same was obtained, first in violation of the constitutional rights of the defendant as guaranteed in the fourth and fifth amendments and, further, that some statement was obtained from the defendant by the officers without his first being warned or advised as to his rights.

The COURT.—The motion is denied. Exception allowed.

Cross-examination.

(By Mr. RAY.)

Q. You say the bank was about fifty or sixty feet high? A. More or less, it was quite steep.

Q. There is quite a run out to the tide there?

A. Some distance.

Q. Ten or twenty feet?

A. Oh, more than that.

Q. A thousand feet?

A. No, about halfway across the street, I should judge.

Q. And Peterson was up on the bank?

A. Yes, sir.

Q. Was anyone else there? A. No, sir.

Q. Look for anyone else there? A. No, sir.

Mr. RAY.—That is all.

Witness excused. [26]

Testimony of C. W. Mossman, for the Government.

C. W. MOSSMAN, a witness called and sworn in behalf of the Government, testified as follows:

Direct Examination.

(By Mr. HURLEY.)

Q. What, if any, position do you hold in Anchorage, Alaska? A. Deputy United States marshal.

Q. Third Division? A. Yes, sir.

Q. How long have you been deputy U. S. marshal?

A. Nine years.

Q. Were you such on September 21, 1922?

A. I was.

Q. Are you the same C. W. Mossman that signed the complaint that is filed in this case? A. I am.

Q. Where were you on the morning of the 21 day of September this year?

A. Well, early in the morning I was on the waterfront in the vicinity of Anchorage.

Q. What were you doing at that time?

A. We were out in the way of our business.

Q. Who was with you?

A. Mr. Hoffman and Mr. Watson.

Q. What did you do after going to the waterfront?

A. For some time we observed the motions and activity of a rowboat that we saw in the bay at a distance.

Q. Where did the boat go?

A. We watched it for some time and it landed alongside the dock, the ocean dock, being where the

(Testimony of C. W. Mossman.)

steamers land, and went up a bank to the approach to the dock there and went into the dock office.

Q. Who went into the dock office?

A. The occupant of the boat that we had been watching. [27]

Q. Then what did he do?

A. He stayed a few minutes and then came out and ran toward us and down to a point opposite the boat, and then to the boat.

Q. How far were you from the dock when you saw the boat land?

A. We were close to the dock, this end of the dock. The distance to me would be close to a quarter of a mile.

Q. Now what happened?

A. He turned the boat loose and went out into the stream. The tide was going out. He rowed the boat across the cannery dock and mouth of Ship Creek and continued along the waterfront; went along the mouth of Chester Creek and continued close to the shore a distance by air line of possibly a mile and a half or two miles from Chester Creek.

Q. Then what did the occupant do?

A. He carried something ashore. We were observing him by eyesight and a pair of glasses. He carried something ashore which we could not identify. We could see the smoke of a fire and then it was necessary for us to go around the beach and to a point opposite the boat, it being then high and dry.

(Testimony of C. W. Mossman.)

Q. Go ahead then and state what you did.

A. We proceeded along the bank to a point more or less directly opposite the boat and we found the defendant Peterson there with his bedding asleep. We uncovered his face so we could recognize him.

Q. Who was with you then?

A. Mr. Hoffman and Mr. Watson.

Q. What did you do?

A. We saw who it was and Hoffman and I proceeded down the bank. [28]

Mr. RAY.—Had you a search-warrant when you went down there?

The WITNESS.—No, sir.

Q. You watched the activities of this person for two or three hours?

A. We were not in sight of him all that time.

Q. Well, as you have described in your testimony? A. Yes, sir.

Mr. RAY.—We object to any further testimony from the witness on the stand.

The COURT.—Objection overruled. Exception allowed.

Mr. HURLEY.—Up until the time that you went down and found Mr. Peterson asleep on the bank did you see or know there was any liquor in the boat? A. No, sir.

Q. You didn't know anything about it at that time? A. No, sir.

Q. Now, you have stated that Mr. Watson stayed with Mr. Peterson, and you and Mr. Hoffman proceeded down the bank to the boat? A. Yes, sir.

(Testimony of C. W. Mossman.)

Q. Was there a fire there? A. No, sir.

Q. Was there a fire on the bank any place?

A. No, sir, the fire had burned out.

Q. About how far was it that Peterson was, that you saw the evidence of the fire you had observed before, to where the boat was?

A. It is rather hard to gauge distances, but it is probably a matter of thirty yards, possibly twenty-five yards. On a straight line I could gauge the distance more accurately. [29]

Q. Now state what you did after you and Mr. Hoffman went down to the boat?

A. We went down this hill and to the boat—headed for the beach and went out to the boat—and found ten ten-gallon kegs of whiskey and some ducks, maybe six or eight.

Q. I wish you would observe these kegs and I will ask you if you know what they are and what they contain? A. I do.

Q. What? A. Whiskey.

Q. How many gallons are there there?

A. Ninety gallons there.

Q. I call your attention to the empty barrel; can you explain how that happened to be empty?

A. After the boys came back with the boat I had a truck go to Ship Creek and they loaded the liquor and took it to my office, and I carelessly let it fall down and it broke.

Q. Have you examined the contents of these barrels? A. I have, yes, sir.

Q. Do you know what they contain?

(Testimony of C. W. Mossman.)

A. Yes, sir.

Q. What? A. Whiskey.

Q. Is the contents of these barrels intoxicating liquor? A. Yes, sir, it is.

Q. Are these barrels and the contents the same as you took from Mr. Peterson that morning?

Mr. RAY.—We object.

The COURT.—Objection overruled. Exception allowed.

A. They are. [30]

Q. And you say that you know of your own knowledge that the contents of these barrels are intoxicating liquors? A. They are.

Mr. RAY.—We move that the testimony of the witness Mossman be stricken and that the jury be instructed to disregard any testimony with reference to the defendant Peterson and any boat or the contents taken without a search-warrant first served in violation of the fourth and fifth amendment to the Constitution of the United States.

The COURT.—The motion is denied. Defendant allowed an exception.

Mr. RAY.—We have no cross-examination.

Witness excused. [31]

Testimony of Charles A. Watson, for the Government.

CHARLES A. WATSON, a witness called and sworn in behalf of the Government, testified as follows:

Direct Examination.

(By Mr. HURLEY.)

Q. What official position do you hold in the Third Division, Territory of Alaska?

A. Deputy U. S. marshal.

Q. Were you a deputy United States marshal on the 21 day of September, 1922? A. I was.

Q. Where were you on the morning of the 21 day of September?

A. I was here in Anchorage.

Q. Where were you along about seven o'clock that morning?

A. Well, between six and seven we went down to the waterfront.

Q. What did you observe there?

A. We observed a boat coming into the ocean dock.

Q. Was there anybody in the boat?

A. We saw a man in the boat.

Q. Just state what the man in the boat did at that time?

A. We saw the boat land at this side of the dock. He got out of the boat and went to the dock. He came hurrying back and hurried away.

Q. Did you recognize who was in the boat at that time? A. No, sir.

(Testimony of Charles A. Watson.)

Q. What did the occupant of the boat do then?

A. After getting back in the boat he came down stream, on across the creek and kept going down until a few miles below Chester Creek, and pulled in there and stopped.

Q. Did you see a man there? A. Yes, sir.

Q. See him get out? A. Yes, sir. [32]

Q. Did you observe anything else?

A. We saw him make a trip or two to the bank and back.

Q. Did you recognize anything or body in the boat? A. No, sir.

Q. Did you know what was in the boat?

A. No, sir.

Q. Just state what you and Mr. Hoffman and Mr. Mossman did?

A. We could see that a fire had been built; here was the smoke. The boat was on the beach. We had to go around a bit and we went down to where the boat was and there we found Chauncey asleep on the bank.

Q. What did you do?

A. Mr. Hoffman pulled a blanket off him to see who he was, and Mr. Hoffman and Mr. Mossman went down to the boat. I stayed on the bank with Peterson.

Q. Had you been down at that time to see what was in the boat? A. No, sir.

Q. At that time, and before you went down to the boat—before Mr. Hoffman and Mr. Mossman returned—did Mr. Peterson, the defendant, make any

(Testimony of Charles A. Watson.)

voluntary statements to you in regard to the boat of any kind?

Mr. RAY.—Just a minute, had you a warrant?

A. No, sir.

Q. Had you placed him under arrest?

A. No, sir.

Q. Was he under arrest while you were talking to him?

A. I don't know that I told him he was.

Q. You in no manner advised him or warned him that any conversation would be used against him? A. I did not.

Mr. RAY.—We object to any conversation.

The COURT.—Objection overruled. Exception allowed. [33]

Q. What statements, if any, did Mr. Peterson make to you at that time?

A. Well, he was about all in he said; he had been out all night shooting ducks and had no sleep for two days. He was all in; played out.

Q. Did he say anything about what was in the boat?

A. I believe he said that he had thirty-five or forty ducks. I don't remember whether he said anything about the booze. I don't remember just what it was. Yes, I remember; I said, "Have you anything in the boat" and he said, "A hundred gallons."

Q. Did you go down to the boat before Mr. Mossman and Mr. Hoffman returned?

(Testimony of Charles A. Watson.)

A. No, sir; after they returned I went down. We had lunch and built a fire.

Q. Then what did you do?

A. We waited there until the tide got right, got in the boat and came back.

Q. Who came back?

A. All of us, Mr. Hoffman, Mr. Peterson and myself.

Q. I wish you would examine these exhibits and state what they are, if you know.

A. White mule, whiskey.

Q. Where did these barrels come from?

A. They came from the boat we brought in.

Q. When was the first time you saw the barrels?

A. After we had lunch I went back down to the boat. I saw the ducks there and built a fire and had lunch there.

Q. Have you examined the contents of these barrels? A. Yes, sir, part of them. [34]

Q. Do you know what they contain?

A. Whiskey, commonly called white mule.

Q. Is that an intoxicating liquor? A. Yes, sir.

Mr. HURLEY.—That is all.

Cross-examination.

(By Mr. RAY.)

Q. You say there were thirty-five or forty ducks in the boat?

A. That was what he said, I didn't count them.

Q. Did you hear Mr. Hoffman say there were five or six ducks in the boat?

(Testimony of Charles A. Watson.)

A. I didn't hear Mr. Hoffman say anything.

Q. You don't recall the conversation you had with Chauncey down there? A. No, he was tired.

Q. When was the last time you talked with any officer connected with the district attorney's office about what Chauncey said to you?

A. I don't remember I said anything; not since he was arrested.

Q. It has not been recently? A. No, sir.

Q. You said nothing to Peterson to the effect that he was under arrest and that you would be obliged to use any statement he might make against him?

A. No, sir.

Q. And, of course, you didn't talk with him for the purpose of testifying? A. No, I didn't.

Q. You are just testifying as to your recollection of what occurred down there? A. Yes, sir.

Mr. RAY.—That is all.

Witness excused.

Government rests. [35]

Mr. RAY.—The defendant moves to direct a verdict on the grounds,

1. That there is no testimony in this case to prove ownership or possession by the defendant Peterson of the liquor introduced in evidence.

2. That there is no testimony of ownership of the boat in Peterson.

3. That there is no testimony in the case tending to connect the defendant with the commission of this offense, and for the further reason that the testimony sought to be introduced has its basis in an

illegal search and seizure in contravention to the Constitution of the United States.

The COURT.—The motion is denied. Defendant allowed an exception.

Mr. RAY.—The defendant has no testimony to offer.

WHEREUPON, after argument by Sherman Duggan, Esq., in behalf of the Government—counsel for defendant waiving argument—the Court instructed the jury. [36]

In the District Court for the Territory of Alaska,
Third Division.

No. 881—CRIMINAL.

UNITED STATES OF AMERICA

vs.

C. F. PETERSON.

Instructions of Court to Jury.

Gentlemen of the Jury:

The defendant in this case is charged with violation of the Alaska Bone Dry Act; by having in his possession intoxicating liquor within the jurisdiction of this court on September 21, 1922.

In order to find the defendant guilty it is necessary that you find every material element of the complaint proven. You must find that he had the liquid charged to be white mule in his possession and you must also find that it was intoxicating liquor.

It is not necessary to find that the offense was committed, if it was committed, at the precise time stated in the complaint; it is only necessary to find that it was committed within two years next preceding the filing of the complaint.

You are instructed that the complaint in this case is a mere accusation or charge against the defendant and is not of itself any evidence of the defendant's guilt, and no juror should permit himself to be influenced against the defendant because the complaint has been filed against him.

In this case, as in all criminal cases, the judge and jury have separate functions to perform. It is your duty to [37] hear all the evidence, all of which is addressed to you, and thereupon to decide and determine the questions of fact arising from the evidence. It is the duty of the judge to decide the questions of the law involved in the trial of the case, and the law makes it your duty to accept as law what is laid down as such by the Court in these instructions. But your power of judging the effect of the evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

The jury are instructed that the law presumes every defendant in a criminal trial to be innocent until his guilt is proven to the satisfaction of the jury beyond all reasonable doubt. The burden of proving beyond all reasonable doubt every material allegation necessary to establish the defendant's guilt rests upon the prosecution throughout the trial, and the burden of proof never shifts to the

defendant. His presumption of innocence is a right guaranteed to him by law and must be given full force and effect by you until you become satisfied from a consideration of all the evidence in the case of his guilt beyond all reasonable doubt.

A reasonable doubt is such a doubt as may fairly and naturally arise in your minds after fully and fairly considering all the evidence in the case. It is that state of the case which leaves the minds of the jurors, after comparison and consideration of all the evidence in such condition that they cannot say they feel an abiding conviction to a moral certainty of the guilt of the defendant. A moral certainty is not an absolute certainty, but such a certainty as excludes every reasonable hypothesis creating a doubt. [38]

It is your duty to give to the testimony of each and all the witnesses such credit as you consider their testimony justly entitled to receive, and in doing so you should not regard the remarks or expressions of counsel, unless the same are in conformity with the facts proven, or are reasonably deducible from such facts and the law as given to you in these instructions.

You are instructed that the evidence is to be estimated not only by its own intrinsic weight, but also according to the testimony which it is within the power of one side to produce and of the other side to contradict, and therefore, if the weaker and less satisfying evidence is produced when it appears that it was within the power of the party offering the same to produce stronger and more satisfying

evidence, such evidence, if so offered, should be viewed with distrust.

In determining the credit you will give a witness and the weight and value you will attach to a witness' testimony, you should take into consideration the conduct and appearance of the witness upon the witness-stand; the interest of the witness, if any, in the result of the trial, the motives of the witness in testifying; the witness' relation to or feeling for or against the defendant; the probability or the improbability of the witness' statements; the opportunity the witness had to observe and to be informed as to the matters respecting which such witness gives testimony, and the inclination of the witness to speak the truth, or otherwise, as to matters within the knowledge of such witness; and you should be slow to believe that any witness has testified falsely, but should try to reconcile the testimony of all the [39] witnesses so as to give credit and weight to all the testimony, if possible. All these matters being taken into account, with all the facts and circumstances given in evidence, it is your province to give to each witness such credit, and the testimony of each witness such value and weight, as you deem proper.

You are not bound to find in conformity with the testimony of any number of witnesses which does not produce conviction in your minds, against a less number, or against a presumption or other evidence satisfying your minds.

You are also instructed that a witness who is wilfully false in one part of his testimony may be

distrusted by you in other parts. If you find that any witness in this case has wilfully testified falsely in one part of his testimony you are at liberty to reject all or any part of his testimony, but you are not bound to do so. You should reject the false part and may give such weight to other parts as you think they are entitled to receive.

The defendant in this trial has waived his right to become a witness in his own defense. It is his privilege, given him by law, to testify or not as he may see fit. The law provides that this waiver of the right to testify shall not create any presumption against him.

You are instructed that the failure of the defendant to testify in his own behalf is not to be considered by you in any way whatever in considering the question of his guilt or innocence. You are to consider that solely upon the evidence in the case.

The presumption of innocence is carried with the defendant throughout the trial. [40]

You are instructed that you should not consider any evidence sought to be introduced but excluded by the Court, nor should you consider any evidence that has been stricken from the record by the Court, nor should you consider in reaching your verdict any knowledge or information known to you, not derived from the evidence as given by the witnesses upon the witness-stand.

You should not allow prejudice or sympathy to swerve you in reaching a verdict according to the evidence and the law as given to you by the Court. Whatever verdict is warranted under the evidence

and instructions of the Court, you should return, as you have sworn to do.

I hand you with these instructions the original complaint in the cause, and a form of verdict which you may use after arriving at a verdict. If you find the defendant not guilty you will write in the word "not" in the blank space before the word "guilty," if you find him guilty, you will draw a line through the blank space.

When you have arrived at a verdict you will cause the same to be signed by your foreman and return it into court.

(Signed) E. E. RITCHIE,

District Judge.

Mr. RAY.—The defendant excepts to the instructions on page five (page —— herein), which has reference to the waiver of the defendant to take the stand in his defense, reading as follows:

"The defendant in this trial has waived his right to become a witness in his own defense. It is his privilege, given him by law, to testify or not as he may see fit. The law provides that his waiver of the right to testify shall not create any presumption against him.

You are instructed that the failure of the defendant [41] to testify in his own behalf is not to be considered by you in any way whatever in considering the question of his guilt or innocence. You are to consider that solely upon the evidence in this case.

The presumption of innocence is carried with the defendant throughout the trial."

Exception allowed.

WHEREUPON, the jury retired to deliberate on their verdict.

Case closed. [42]

I do certify that I am the official court reporter for the Third Division, Territory of Alaska; that as such I reported the proceedings had at the trial of the above-entitled cause, to wit: United States of America versus C. F. Peterson, No. 881—Criminal; that the foregoing transcript is a full, true and correct transcript of the evidence introduced and the proceedings had at the trial of said cause.

Dated at Valdez, Alaska, this ninth day of January, 1922.

(Signed) J. W. LENAHA. [43]

In the District Court for the Territory of Alaska,
Third Division.

No. 881—CRIMINAL.

UNITED STATES OF AMERICA

vs.

C. F. PETERSON,

Defendant.

Verdict.

We, the jury duly empanelled and sworn in the above-entitled cause, do find the defendant guilty, as charged in the complaint.

H. I. STAGER,
Foreman.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 28th, 1922.
W. N. Cuddy, Clerk. [44]

In the District Court for the Territory of Alaska,
Third Division.

No. 881—CRIMINAL.

UNITED STATES OF AMERICA

vs.

C. F. PETERSON,

Defendant.

Motion in Arrest of Judgment.

Comes now the above-named defendant, by his attorneys of record, and prays the Court that no judgment be rendered against him on the verdict of "guilty" heretofore returned into court in said cause: in that the facts stated in the complaint upon which said defendant was placed on trial do not constitute a crime, and that said court is without jurisdiction to render judgment against said defendant.

Dated, Anchorage, Alaska, November 28, 1922.

C. F. PETERSON,

By L. V. RAY,

His Attorney.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 28, 1922.
W. N. Cuddy, Clerk.

2199.

2207.

2282. [45]

In the District Court for the Territory of Alaska,
Third Division.

No. 881—CRIMINAL.

M. O.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. F. PETERSON,

Defendant.

Order Denying Motion in Arrest of Judgment.

This matter came on for hearing on motion of L. V. Ray, Esq., counsel for the defendant, in arrest of judgment, the defendant being present in person and represented by his counsel, L. V. Ray, Esq.; the plaintiff being represented by Sherman Duggan, Esq., United States Attorney.

WHEREUPON, after argument, the motion was denied. [46]

In the District Court for the Territory of Alaska,
Third Division.

No. 881—CRIMINAL.

UNITED STATES OF AMERICA

vs.

C. F. PETERSON,

Defendant.

Judgment and Sentence.

This cause coming on to be heard before this Court on the 15th day of December A. D. 1922, and the plaintiff, United States of America, appearing and being represented by Sherman Duggan, United States Attorney, and the defendant being personally present in open court, in the custody of the United States Marshal, and appearing by and being represented by his attorney, L. V. Ray, and the Court having fixed this date as the time to pass sentence and pronounce judgment upon defendant, C. F. Peterson, in this action, and it appearing to the Court:

That defendant, C. F. Peterson, was convicted of the crime of having intoxicating liquor in his possession in violation of the Act of Congress, approved February 14, 1917, known as the Alaska Dry Law, in the court of the United States Commissioner for Knik Precinct, Third Division, Territory of Alaska, and thereupon appealed said cause to this Court.

That on the 28th day of November, 1922, at the November 10th, 1922, term of the above-entitled court, held at Anchorage, Third Division, Territory of Alaska, defendant being personally present in court and being represented by L. V. Ray, his attorney, and Sherman Duggan, United States Attorney, appearing for and representing plaintiff, and defendant then and there having been duly tried by a jury, and having been by said jury in said Court duly and regularly convicted, and the Court

finding in accordance with said verdict of said jury that defendant is guilty and this being the time and place set and agreed upon for sentence and judgment in the above-entitled action, upon said verdict of guilty against said defendant, and defendant at this time being present in person and [47] by his attorney L. V. Ray, and being asked by the Court if he had any reason to give or suggest to the Court why judgment should not be pronounced upon him according to law, and defendant then and there showing no valid reason or excuse in that behalf, and the Court being fully advised,—

IT IS ORDERED AND ADJUDGED that as punishment for the offense above set forth, you, C. F. Peterson, the said defendant, be imprisoned for the term of one (1) year in the federal jail at Anchorage, Third Division, Territory of Alaska, and that in addition thereto you pay a fine in the sum of One Thousand and no/100 (\$1000) Dollars, and in default of the payment of such fine you serve a term in the above-named federal jail not to exceed one (1) day for each \$2.00 of said fine unpaid, and that in addition to said imprisonment and fine you pay the costs of this action, taxed at \$ No and the United States marshal be and he is hereby ordered and instructed, in pursuance of the judgment herein rendered, to take said C. F. Peterson, defendant, into custody, in execution of said sentence. A certified copy of this judgment is a sufficient commitment to the United States marshal, Third Division, Territory of Alaska, to take

said defendant into custody and to carry out said judgment and sentence.

Done in open court at Anchorage, Alaska, this 15th day of December, 1922.

E. E. RITCHIE,

Judge of the District Court, Third Division, Territory of Alaska. [48]

In the District Court for the Territory of Alaska,
Third Division.

No. 881.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. F. PETERSON,

Defendant.

Bail Bond Pending Writ of Error.

We, C. F. Peterson, Z. J. Loussac and P. O. Sundberg, jointly and severally, acknowledge ourselves indebted to the United States of America, in the sum of \$2,000.00, lawful money of the United States of America, to be levied on our, and each of our goods, chattels, lands and tenements, upon this condition:

WHEREAS, the said C. F. Peterson has sued out a Writ of Error from the judgment of the District Court for the Territory of Alaska, Third Division, in the case in said court wherein the United States of America was plaintiff and the

said C. F. Peterson is defendant, for a review of said judgment in the United States Circuit Court of Appeals for the Ninth Circuit.

NOW, if the said C. F. Peterson shall appear and surrender himself in the District Court for the Territory of Alaska, Third Division, on and after filing in said District Court of the mandate of the said Circuit Court of Appeals, and from time to time thereafter as he may be required to answer any further proceedings, and abide by and perform any judgment or order which may be had or rendered therein in this case, and shall abide by and perform any judgment or order which may be rendered in said United States Circuit Court of Appeals for the Ninth Circuit, and not depart from said District Court without leave thereof, then this obligation shall be void; otherwise to remain in full force and virtue.

WITNESS our hands and seals, this 28th day of December, 1922.

C. F. PETERSON. (Seal)

P. O. SUNDBERG. (Seal)

Z. J. LOUSSAC. (Seal)

Taken and approved, this 29th day of December, 1922, before me,

E. E. RITCHIE,
District Judge. [49]

United States of America,
Territory of Alaska,—ss.

We, Z. J. Loussac and P. O. Sundberg, sureties on the foregoing bond, each for self and not one

for the other, being severally duly sworn, deposes and says that he is a resident of the Territory of Alaska; that he is not a counselor or attorney at law, commissioner, marshal, clerk, or any other officer of any court; that he is worth the amount of \$2,000.00 over and above all his just debts and liabilities and exclusive of property exempt from execution.

P. O. SUNDBERG.

Z. J. LOUSSAC.

Subscribed and sworn to before me this 29th day of December, 1922.

E. E. RITCHIE,

District Judge. [50]

In the District Court for the Territory of Alaska,
Third Division.

No. 881—CRIMINAL.

UNITED STATES OF AMERICA

vs.

C. F. PETERSON,

Defendant.

Order Settling and Certifying Bill of Exceptions.

This cause having come on for hearing upon motion of defendant for an order settling and certifying his bill of exceptions to be used upon his writ of error, about to be prosecuted in said cause to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and sentence

made and pronounced herein on the 15th day of December, 1922, against the defendant, upon a verdict of guilty of wilfully and unlawfully having in his possession intoxicating liquor in violation of the provisions of the Act of Congress, approved February 14th, 1917, commonly known as the Alaska Dry Law, said offense being alleged in the complaint thereof as of the 21st day of September, A. D. 1922; and, it appearing that said defendant filing herein his proposed bill of exceptions, served the same upon counsel for the United States, giving due notice of the date and place of settlement of said bill of exceptions, and no amendments or objections to said bill of exceptions having been made by the United States, and, the undersigned Judge of said District Court having inspected and considered the same, and found such bill of exceptions to contain all the papers, pleadings, proceedings and exceptions necessary to a determination of the questions involved and raised by defendant's exceptions,—

It is therefore ordered that the foregoing bill of exceptions be and the same is hereby allowed, approved and settled, and that the same shall constitute defendant's bill of exceptions upon the prosecution of his writ of error in said cause; [51]

And, it is further ordered that this order shall be deemed and shall be taken as a certificate of the undersigned Judge of said District Court, being the same Judge who presided over the trial of said cause, and such bill of exceptions consists of and contains all papers, pleadings, testimony, proceedings and exceptions filed, presented, had and

done in said cause, and all of the matters upon which said judgment of December 15th, 1922, is based, and of all matters and things necessary and proper for determination of the questions involved herein, or raised, or attempted to be raised by said writ of error.

I further certify that this cause was tried at the November, 1922, Anchorage Term of this court; that said term of court is still alive, having been adjourned by order of Court made December 30, 1922, to March 5, 1923; and the bill of exceptions herein is settled and signed this day at the Valdez term of this court because court is now in session at Valdez and not at Anchorage.

Done at Valdez, Alaska, this 1st day of March, 1923.

E. E. RITCHIE,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Mar. 1, 1923. W. N. Cuddy, Clerk. By S. I. Hemple, Deputy.

Entered Court Journal, No. 13, p. No. 800. [52]

In the District Court for the Territory of Alaska,
Third Division.

No. 881—CRIMINAL.

UNITED STATES OF AMERICA

vs.

C. F. PETERSON,

Defendant.

Assignment of Errors.

Comes now the defendant, C. F. Peterson, in the above-entitled action, and makes and files the following assignment of errors, upon which the defendant will rely in the prosecution of his writ of error herein:

First. The Court erred in overruling the objection of the defendant to the introduction of any testimony in the cause, and proceeding to the trial of the same upon the complaint in said cause, as follows:

“Mr. RAY.—Defendant objects to the introduction of any testimony of the witness, after being sworn and now on the stand, on the ground that this Court is without jurisdiction to try the case on the complaint on file here: First, on the ground that it is in violation of the rights of the defendant as guaranteed to him under the fifth amendment to the Constitution of the United States providing that no prosecution for a felony may be had except on the presentment of a grand jury; and, second, the complaint on which this charge is based is signed ‘C. W. Mossman,’ not ‘C. W. Mossman, deputy marshal,’ and is, therefore, invalid.

In view of the provisions of Sec. 1891, R. S., that ‘The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in

every Territory hereafter organized as elsewhere within the United States,' it is our contention that the Alaska Bone Dry Law being a statute of the United States, and the term of imprisonment on a conviction under it may be more than one year, that a case can only be tried after presentment and indictment by a grand jury. I also desire to renew again the plea in abatement which I filed this morning: That the records and files of this court show that for this same offense, with reference to the same intoxicating liquor, this man is now being held to answer before the grand jury, and that the doctrine of merger should apply. I would just like to read from volume 16, C. J., section 10: 'The merger of one offense in another occurs when the same criminal act constitutes both a felony and a misdemeanor. In such a case, at common law, the misdemeanor is merged in the felony, and the latter only is punishable. This doctrine applies [53] only where the same criminal act constitutes both offenses, and where there is identity of time, place, and circumstances. Moreover, the offenses must be of different grades, and the rule does not apply where both offenses are felonies or misdemeanors.'

The COURT.—At this time I will deny the motion. While I think there is something in one point which Mr. Ray has raised I do not think it should be decided hastily and if I should be wrong in denying the motion at this

time the same point can be raised on motion in arrest of judgment. As to the objection to the complaint, I think the description in the body of the complaint of C. W. Mossman, as a deputy United States Marshal is sufficient. Defendant allowed an exception.

Second. The Court erred in permitting the witness Hoffman to testify, over the objection and exception of the defendant, as to the occurrences which were the basis of the prosecution, upon the ground that the witness Hoffman has no search-warrant, which testimony was as follows:

Mr. RAY.—Had you a search-warrant when you went down there?

The WITNESS.—We did not.

Mr. RAY.—The defendant objects to the introduction of any further testimony of the witness as to the defendant or the boat, on the ground that such evidence attempted to be offered is in plain violation of the constitutional rights of the defendant guaranteed him under the fourth and fifth amendments to the Constitution of the United States.

The COURT.—Objection overruled. Exception allowed.

Third. The Court erred in permitting the conversation of the defendant Peterson with the officer Hoffman to be introduced, over and against the objection and exception of the defendant, as follows:

Q. What was said by Mr. Peterson and you at that time?

Mr. RAY.—We object to any conversation had by the defendant and officers at that time.

The COURT.—You may find out whether he was under arrest at the time or whether he made a voluntary statement.

Mr. RAY.—Was Peterson under arrest at the time of your conversation with him?

The WITNESS.—Yes, I think so.

Q. Did you tell him that you would testify as to anything he might say?

A. I did not. [54]

Q. Did you advise him that whatever he said would be used against him on the trial of the case?

A. It was a general conversation.

Q. At no time did you yourself tell him that anything you say might be used against you at the trial of the case.

A. No, sir, nothing like that was said.

Mr. RAY.—We object to the conversation.

The COURT.—Did you offer him any inducement of any kind or try to persuade him to talk?

A. His conversation was voluntary.

The COURT.—The objection is overruled.

Exception allowed.

Fourth. The Court erred in denying the motion of the defendant to strike out the testimony of the witness Hoffman, to which ruling an exception to the defendant was allowed by the Court, as follows:

Mr. RAY.—We ask that the witness Hoffman's testimony be stricken on the ground that the same was obtained, first, in violation of the

constitutional rights of the defendant as guaranteed in the fourth and fifth amendments and, further, that some statement was obtained from the defendant by the officers without his first being warned or advised as to his rights.

The COURT.—The motion is denied. Exception allowed.

Fifth.—The Court erred in permitting the introduction of testimony of the witness Mossman relative to occurrences upon which the prosecution was based, over and against the objection and exception of the defendant, as follows:

Mr. RAY.—Had you a search-warrant when you went down there?

The WITNESS.—No, sir.

Q. You watched the activities of this person for two or three hours?

A. We were not in sight of him all that time.

Q. Well, as you have described in your testimony? A. Yes, sir.

Mr. RAY.—We object to any further testimony from the witness on the stand.

The COURT.—Objection overruled. Exception allowed. [55]

Sixth. The Court erred in denying the motion of the defendant to strike out the testimony of the witness Mossman, to which ruling an exception to the defendant was allowed by the Court, as follows:

Mr. RAY.—We move that the testimony of the witness Mossman be stricken and that the jury be instructed to disregard any testimony

with reference to the defendant Peterson and any boat or the contents taken without a search-warrant first served in violation of the fourth and fifth amendments to the Constitution of the United States.

The COURT. The motion is denied. Defendant allowed an exception.

Seventh. The Court erred in permitting the introduction of testimony of the witness Watson as to a conversation with the defendant at the time of his arrest, over and against the objection and exception of the defendant, as shown by the bill of exceptions:

Q. At that time, and before you went down to the boat—before Mr. Hoffman and Mr. Mossman returned—did Mr. Peterson, the defendant, make any voluntary statements to you in regard to the boat of any kind?

Mr. RAY.—Just a minute, had you a warrant? A. No, sir.

Q. Had you placed him under arrest?

A. No, sir.

Q. Was he under arrest while you were talking to him?

A. I don't know that I told him he was.

Q. You in no manner advised him or warned him that any conversation would be used against him? A. I did not.

Mr. RAY.—We object to any conversation.

The COURT.—Objection overruled. Exception allowed.

Eighth. The Court erred in denying the motion of the defendant for a directed verdict of not guilty,

to the denial of which motion an exception was allowed by the Court, as shown by the bill of exceptions: [56]

Mr. RAY.—The defendant moves to direct a verdict on the grounds:

1. That there is no testimony in this case to prove ownership or possession by the defendant Peterson of the liquor introduced in evidence.

2. That there is no testimony of ownership of the boat in Peterson.

3. That there is no testimony in the case tending to connect the defendant with the commission of this offense, and for the further reason that the testimony sought to be introduced has its basis in an illegal search and seizure in contravention to the Constitution of the United States.

The COURT.—The motion is denied. Defendant allowed an exception.

Ninth. The Court erred in denying the motion of defendant in arrest of judgment, on the ground that the Court was without jurisdiction to render judgment against the defendant.

Tenth. The Court erred in entering judgment in said cause against defendant.

WHEREFORE, the defendant, C. F. Peterson, as plaintiff in error, prays that the judgment and sentence of the District Court for the Territory of Alaska, Third Division, made and pronounced

on the 15th day of December, 1923, may be reversed, set aside and vacated.

L. V. RAY,
Attorney for Plaintiff in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 2, 1923. W. N. Cuddy, Clerk. By ———, Deputy.

Service of the foregoing assignment of errors, by receipt of copy thereof, admitted this 2d day of November, 1923.

JULIEN A. HURLEY,
Assistant United States Attorney." [57]

In the District Court for the Territory of Alaska,
Third Division.

No. 881—CRIMINAL.

UNITED STATES OF AMERICA,
Plaintiff,
against

C. F. PETERSON,
Defendant.

Petition for Writ of Error.

Comes now the above-named defendant C. F. Peterson, and says: That on the 15th day of December, 1922, this Court entered judgment against the defendant upon a verdict of guilty of the offense of having intoxicating liquor in his possession at Anchorage, Alaska, on the 21st day of September, 1922, in violation of the Act known as "An Act to Pro-

hibit the Manufacture or Sale of Alcoholic Liquors in the Territory of Alaska and for Other Purposes," approved February 14, 1917 (said Act being commonly known as the Alaska Bone Dry Law), directing the imprisonment of the said defendant for a period of one year in the federal jail at Anchorage, Alaska, and also to pay a fine of One Thousand Dollars, and in lieu of and failure to pay such fine to serve one day for every Two Dollars of such fine until the same is satisfied;

That in said judgment, and in the proceedings had prior thereto, certain errors were committed to the prejudice of the defendant, all of which more fully appear in the assignment of errors, which is filed with this petition. [58]

WHEREFORE the defendant prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the errors so complained of, and that the transcript of the record, testimony, proceedings, and papers in this cause, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may be proper therein.

L. V. RAY,

Attorney for Defendant.

Service of the above petition for writ of error admitted this 2d day of November, 1923, by receipt of copy thereof.

JULIEN A. HURLEY,

Assistant United States Attorney.

Filed in the District Court, Territory of Alaska,
Third Division. Nov. 2, 1923. W. N. Cuddy,
Clerk. By ———, Deputy. [59]

In the District Court for the Territory of Alaska,
Third Division.

No. 881—CRIMINAL.

UNITED STATES OF AMERICA,
Plaintiff,
against
C. F. PETERSON,
Defendant.

Order Allowing Writ of Error.

On this 2d day of November, A. D. 1923, came the defendant herein, by his attorney, and filed and presented to the Court his petition praying for the allowance of a writ of error and the assignment of errors intended to be urged by him; praying, also, that a transcript of the record, testimony, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises;

And, it appearing to the Court, the said defendant has heretofore filed herein a duly approved appearance or bail bond, and also a duly approved cost bond.

NOW, THEREFORE, in consideration of the premises, and the Court being fully advised,—

IT IS ORDERED that the aforesaid writ of error be, and the same is hereby allowed.

IT IS FURTHER ORDERED the duly approved bond heretofore filed in this cause by the defendant shall operate as a supersedeas, or stay of sentence. [60]

And IT IS FURTHER ORDERED that a transcript of the record, testimony, files and proceedings in this cause, save as modified by the order of this Court relative to certain of the original exhibits introduced in evidence in said cause, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

E. E. RITCHIE,
District Judge.

Filed in the District Court, Territory of Alaska, Third Division. Nov. 2, 1923. W. N. Cuddy, Clerk. By ————, Deputy.

Entered Court Journal 14, page No. 11. [61]

In the District Court for the Territory of Alaska,
Third Division.

No. 881—CRIMINAL.

UNITED STATES OF AMERICA,

Plaintiff,

against

C. F. PETERSON,

Defendant.

Undertaking for Costs.

A judgment having been given on the 15th day of December, 1922, whereby the above-named defendant, C. F. Peterson, was found guilty of the offense of having intoxicating liquor in his possession at Anchorage, Alaska, on the 21st day of September, 1922, in violation of the Act known as "An Act to Prohibit the Manufacture and Sale of Alcoholic Liquors in the Territory of Alaska and for Other Purposes," approved February 14th, 1917, and sentenced to serve a term of one year in the federal jail at Anchorage, Alaska, and also to pay a fine of One Thousand Dollars, and having appealed from such judgment or sentence to the United States Circuit Court of Appeals for the Ninth Circuit,

We, P. O. Sundberg, of Anchorage, Alaska, by occupation merchant and Z. J. Loussac, of Anchorage, Alaska, by occupation druggist, hereby undertake that the above-named C. F. Peterson shall pay all costs that may be awarded against him on appeal not exceeding the sum of \$250.00.

IN WITNESS WHEREOF, we have hereunto set our hands this 20th day of October, 1923.

C. F. PETERSON,

Principal.

P. O. SUNDBERG,

Z. J. LOUSSAC,

Sureties.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Div. Nov. 2, 1923. W. N. Cuddy, Clerk. [62]

United States of America,
Territory of Alaska,—ss.

P. O. Sundberg and Z. J. Loussac, the sureties named on the within bond, being severally first duly sworn, each for self and not one for the other, depose and say: That they are the persons who signed the foregoing undertaking; that they are not attorneys or counselors at law, U. S. Commissioner, U. S. Marshal, Deputy U. S. Marshal or other officer of any court and that they are worth the sum specified in the foregoing undertaking as the penalty thereof over and above their just debts and liabilities and exclusive of property exempt from execution.

P. O. SUNDBERG.
Z. J. LOUSSAC.

Subscribed and sworn to before me this 20th day of October, 1923.

[Notarial Seal] LEOPOLD DAVID,
Notary Public for Alaska, Residing at Anchorage,
Alaska.

My commission expires Sept. 24, 1925.

The foregoing bond approved this 2d day of November, 1923.

E. E. RITCHIE,
District Judge. [63]

In the District Court for the Territory of Alaska,
Third Division.

No. 881—CRIMINAL.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,
against

C. F. PETERSON,
Defendant and Plaintiff in Error.

Writ of Error.

The United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States, to the Honorable E. E. RITCHIE, Judge of the District Court for the Territory of Alaska, Third Division, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in said District Court before you, between the United States of America, plaintiff, and C. F. Peterson, defendant, manifest error hath happened to the great damage of the said defendant C. F. Peterson, as is stated in his petition herein, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the

same, to the United States Circuit Court of Appeals for the Ninth Circuit, within thirty days from the date of this writ, so that you have the same in said court at San Francisco in [64] the State of California, in said Circuit, to be then and there held; that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 2d day of November, in the year of our Lord one thousand nine hundred and twenty-three, and in the 148th year of the Independence of the United States of America.

Allowed by:

E. E. RITCHIE,
Judge of the District Court for the Territory of
Alaska, Third Division.

Attest: W. N. CUDDY,
Clerk of the District Court for the Territory of
Alaska, Third Division.

Entered Court Journal No. 14, page No. 12.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 2, 1923.
W. N. Cuddy, Clerk. [65]

In the District Court for the Territory of Alaska,
Third Division.

No. 881—CRIMINAL.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,
against

C. F. PETERSON,
Defendant and Plaintiff in Error.

Citation on Writ of Error (Original).

United States of America,
Territory of Alaska,—ss.

The United States of America to the Attorney General of the United States, and to Honorable SHERMAN DUGGAN, United States Attorney for the Territory of Alaska, Third Division,
GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, in the State of California within thirty days from the date of this writing, pursuant to a writ of error filed in the clerk's office of the District Court for the Territory of Alaska, Third Division, wherein C. F. Peterson is plaintiff in error, and the United States of America is defendant in error, and show cause, if any there be, why the judgment in said writ of error should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 2d day of November in the year of our Lord one thousand nine hundred and twenty-three and in the 148th year of the Independence of the United States of America.

E. E. RITCHIE,

District Judge, Territory of Alaska.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Div. Nov. 2, 1923. W. N. Cuddy, Clerk. [66]

United States of America,
Territory of Alaska,
Third Division,—ss.

I, the undersigned clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the attached is a full, true and correct copy of the original citation on writ of error in the case of United States of America against C. F. Peterson,—Criminal No. 881—as the same appears on file and of record in my office.

IN TESTIMONY WHEREOF, I have subscribed my name and affixed the seal of the said Court at Valdez, Alaska, this 2d day of November, 1923.

[Seal]

W. N. CUDDY,
Clerk.

By _____,
Deputy. [66a]

In the District Court for the Territory of Alaska,
Third Division.

No. 881—CRIMINAL.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,
against

C. F. PETERSON,
Defendant and Plaintiff in Error.

Citation on Writ of Error (Copy).

United States of America,
Territory of Alaska,—ss.

The United States of America to the Attorney General of the United States, and to Honorable SHERMAN DUGGAN, United States Attorney for the Territory of Alaska, Third Division, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held in the city of San Francisco, in the State of California within thirty days from the date of this writing, pursuant to a writ of error filed in the clerk's office of the District Court for the Territory of Alaska, Third Division, wherein C. F. Peterson is plaintiff in error, and the United States of America is defendant in error, and show cause, if any there be, why the judgment in said writ of error should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 2d day of November, in the year of our Lord one thousand nine hundred and twenty-three, and in the 148th year of the Independence of the United States of America.

E. E. RITCHIE,

District Judge, Territory of Alaska.

Service acknowledged this 2d day of November, 1923, by receipt of a certified copy of citation.

JULIEN A. HURLEY,

Assistant U. S. Attorney. [67]

In the District Court for the Territory of Alaska,
Third Division.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Territory of Alaska,
Third Division,—ss.

I, W. N. Cuddy, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the above and foregoing, and hereto annexed 69 pages, numbered from 1 to 69 inclusive, are a full, true and correct transcript of records and files of the proceedings in the above-entitled cause, as the same appears on the records and files in my office; that this transcript is made in accordance with the defendant's praecipe on file herein.

I FURTHER CERTIFY that the foregoing transcript has been prepared, examined and certified to by me on behalf of the defendant, plaintiff in error, and that the costs thereof, amounting to \$18.00 have been paid to me by L. V. Ray, Esq., attorney for the defendant and plaintiff in error.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 3d day of November, A. D. 1923.

[Seal]

W. N. CUDDY,
Clerk. [68]

[Endorsed]: No. 4147. United States Circuit Court of Appeals for the Ninth Circuit. C. F. Peterson, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Third Division.

Filed November 17, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeal
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

C. F. PETERSON,

Plaintiff in Error,

vs.

THE UNITED STATES OF
AMERICA,

Defendant in Error.

No. 4147

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
TERRTIORY OF ALASKA, THIRD
DIVISION.

BRIEF OF PLAINTIFF IN ERROR.

JOHN F. DORE,

FRANCIS C. REAGAN,

Seattle, Washington.

L. V. RAY,

Seward, Alaska,

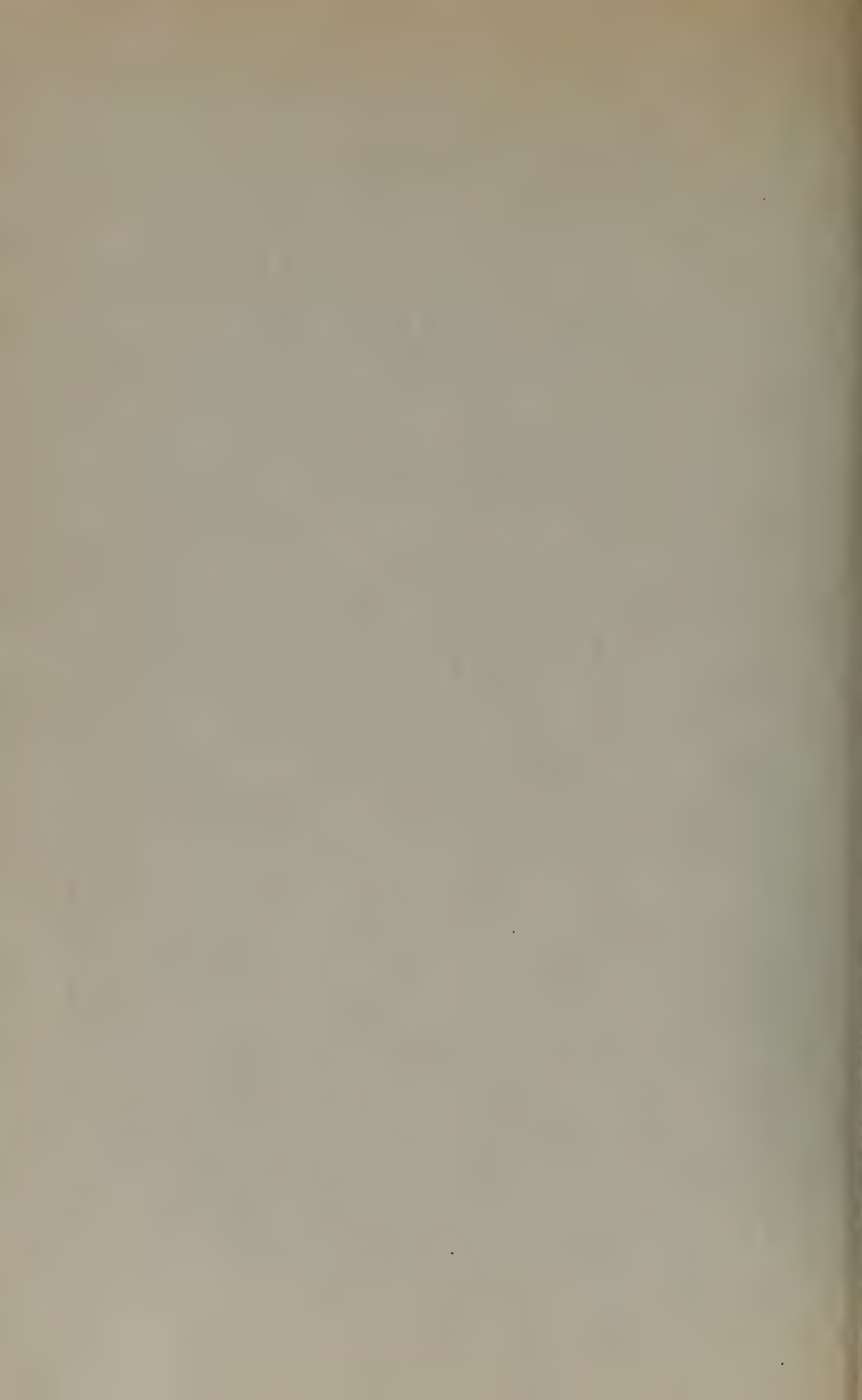
Plaintiff in Error.

J. L. MACDONALD CO., PRINTERS AND PUBLISHERS, SEATTLE

FILED

MAR 1 - 1924

U. S. DISTRICT COURT,
SEATTLE



United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

C. F. PETERSON,

Plaintiff in Error,

vs.

THE UNITED STATES OF

AMERICA,

Defendant in Error.

No. 4147

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
TERRTIORY OF ALASKA, THIRD
DIVISION.

BRIEF OF PLAINTIFF IN ERROR.

JOHN F. DORE,

FRANCIS C. REAGAN,

Seattle, Washington.

L. V. RAY,

Seward, Alaska,

Attorneys for Plaintiff in Error.

STATEMENT OF THE CASE.

Plaintiff in error, C. F. Peterson, was charged before W. H. Rager, United States Commissioner and ex-officio justice of the peace for Knik Precinct, Territory of Alaska, with having, on the 21st day of September, 1922, in said precinct, intoxicating liquor, to-wit, whiskey, known as "white mule," in violation of the provisions of the Act of Congress, approved February 14, 1917, commonly known as the "Alaska Dry Law."

Thereafter a hearing was had before said Commissioner and plaintiff in error was found guilty. An appeal was taken to the United States District Court for the Territory of Alaska, Third Division, and upon a trial thereof plaintiff in error was found guilty and judgment entered against him and he was sentenced to one year in the federal jail at Anchorage, Alaska, and in addition thereto to pay a fine of \$1,000.00, and in default of the payment of such fine to serve a term in said jail not to exceed one day for each \$2.00 of said fine unpaid.

ASSIGNMENT OF ERRORS.

First. The Court erred in overruling the objection of the defendant to the introduction of any testimony in the cause, and proceeding to the trial

of the same upon the complaint in said cause, as follows:

“Mr. RAY.—Defendant objects to the introduction of any testimony of the witness, after being sworn and now on the stand, on the ground that this Court is without jurisdiction to try the case on the complaint on file here: First, on the ground that it is violation of the rights of the defendant as guaranteed to him under the fifth amendment to the Constitution of the United States providing that no prosecution for a felony may be had except on the presentment of a grand jury; and, second, the complaint on which this charge is based is signed ‘C. W. Mossman,’ not ‘C. W. Mossman, deputy marshal,’ and is, therefore, invalid.

In view of the provisions of Sec. 1891, R. S., that ‘The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States,’ it is our contention that the Alaska Bone Dry Law being a statute of the United States, and the term of imprisonment on a conviction under it may be more than one year, that a case can only be tried after presentment and indictment by a grand jury. I also desire to renew again the plea in abatement which I filed this morning: That the records and files of this court show that for this same offense, with reference to the same intoxicating liquor, this man is now being held to answer before the grand jury, and that the doctrine of merger should apply. I would

just like to read from volume 16, C. J., section 10: 'The merger of one offense in another occurs when the same criminal act constitutes both a felony and a misdemeanor. In such a case at common law, the misdemeanor is merged in the felony, and the latter only is punishable. This doctrine applies [53] only where the same criminal act constitutes both offenses, and where there is identity of time, place, and circumstances. Moreover, the offenses must be of different grades, and the rule does not apply where both offenses are felonies or misdemeanors.'

The COURT.—At this time I will deny the motion. While I think there is something in one point which Mr. Ray has raised I do not think it should be decided hastily and if I should be wrong in denying the motion at this time the same point can be raised on motion in arrest of judgment. As to the objection to the complaint, I think the description in the body of the complaint of C. W. Mossman, as a deputy United States Marshal is sufficient. Defendant allowed an exception.

Second. The Court erred in permitting the witness Hoffman to testify, over the objection and exception of the defendant, as to the occurrences which were the basis of the prosecution, upon the ground that the witness Hoffman has no search-warrant, which testimony was as follows:

Mr. RAY.—Had you a search-warrant when you went down there?

The WITNESS.—We did not.

Mr. RAY.—The defendant objects to the introduction of any further testimony of the witness as to the defendant or the boat, on the ground that such evidence attempted to be offered is in plain violation of the constitutional rights of the defendant guaranteed him under the fourth and fifth amendments to the Constitution of the United States.

The COURT.—Objection overruled. Exception allowed.

Third. The Court erred in permitting the conversation of the defendant Peterson with the officer Hoffman to be introduced, over and against the objection and exception of the defendant, as follows:

Q. What was said by Mr. Peterson and you at that time?

Mr. RAY.—We object to any conversation had by the defendant and officers at that time.

The COURT.—You may find out whether he was under arrest at the time or whether he made a voluntary statement.

Mr. RAY.—Was Peterson under arrest at the time of your conversation with him?

The WITNESS.—Yes, I think so.

Q. Did you tell him that you would testify as to anything he might say?

A. I did not. [54]

Q. Did you advise him that whatever he said would be used against him on the trial of the case?

A. It was a general conversation.

Q. At no time did you yourself tell him that anything you might say might be used against you at the trial of the case.

A. No, sir, nothing like that was said.

Mr. RAY.—We object to the conversation.

The COURT.—Did you offer him any inducement of any kind or try to persuade him to talk?

A. His conversation was voluntary.

The COURT.—The objection is overruled. Exception allowed.

Fourth. The Court erred in denying the motion of the defendant to strike out the testimony of the witness Hoffman, to which ruling an exception to the defendant was allowed by the Court, as follows:

Mr. RAY.—We ask that the witness Hoffman's testimony be stricken on the ground that the same was obtained, first, in violation of the constitutional rights of the defendant as guaranteed in the fourth and fifth amendments and, further, that some statement was obtained from the defendant by the officers without his first being warned or advised as to his rights.

The COURT.—The motion is denied. Exception allowed.

Fifth. The Court erred in permitting the introduction of testimony of the witness Mossman relative to occurrences upon which the prosecution was based, over and against the objection and exception of the defendant, as follows:

Mr. RAY.—Had you a search-warrant when you went down there?

The WITNESS.—No, sir.

Q. You watched the activities of this person for two or three hours?

A. We were not in sight of him all that time.

Q. Well, as you have described in your testimony? A. Yes, sir.

Mr. RAY.—We object to any further testimony from the witness on the stand.

The COURT.—Objection overruled. Exception allowed. [55]

Sixth. The Court erred in denying the motion of the defendant to strike out the testimony of the witness Mossman, to which ruling an exception to the defendant was allowed by the Court, as follows:

Mr. RAY.—We move that the testimony of the witness Mossman be stricken and that the jury be instructed to disregard any testimony with reference to the defendant Peterson and any boat or the contents taken without a search-warrant first served in violation of the fourth and fifth amendments to the Constitution of the United States.

The COURT.—The motion is denied. Defendant allowed an exception.

Seventh. The Court erred in permitting the introduction of testimony of the witness Watson as to a conversation with the defendant at the time of his arrest, over and against the objection and exception of the defendant, as shown by the bill of exceptions.

Q. At that time, and before you went down to the boat—before Mr. Hoffman and Mr. Mossman returned—did Mr. Peterson, the defendant, make any voluntary statement to you in regard to the boat of any kind?

Mr. RAY.—Just a minute, had you a warrant? A. No, sir.

Q. Had you placed him under arrest?

A. No, sir.

Q. Was he under arrest while you were talking to him?

A. I don't know that I hold him he was.

Q. You in no manner advised him or warned him that any conversation would be used against him. A. I did not.

Mr. RAY.—We object to any conversation.

The COURT.—Objection overruled. Exception allowed.

Eighth. The Court erred in denying the motion of the defendant for a directed verdict of not guilty, to the denial of which motion an exception was allowed by the Court, as shown by the bill of exceptions: [56]

Mr. RAY.—The defendant moves to direct a verdict on the grounds:

1. That there is no testimony in this case to prove ownership or possession by the defendant Peterson of the liquor introduced in evidence.

2. That there is no testimony of ownership of the boat in Peterson.

3. That there is no testimony in the case tending to connect the defendant with the commission of this offense, and for the further reason that the testimony sought to be introduced has its basis in an illegal search and seizure in contravention to the Constitution of the United States.

The COURT.—The motion is denied. Defendant allowed an exception.

Ninth. The Court erred in denying the motion of defendant in arrest of judgment, on the ground that the Court was without jurisdiction to render judgment against the defendant.

Tenth. The Court erred in entering judgment in said cause against defendant.

ARGUMENT.

The record in this case shows that prior to the filing of this charge before the United States Commissioner under the Alaska Dry Law, plaintiff in error was charged under the National Prohibition Act and bound over by said Commissioner to appear before the next grand jury of the Third Division of the Territory of Alaska upon the same charge (Tr. p. 23). The evidence shows that on the day in question Government officers were standing on the dock at Anchorage, when they saw a boat come up to the dock and land there; that a man whose identity they did not know got out of said boat and went into the dock office and after a while he came out, got into his boat and went down the bay three or four miles and landed there. They further testified that they saw the party in the boat make two

or three trips from the boat to the shore; that they knew he could not get away, so they went down there and found plaintiff in error asleep on the bach, and a boat (Tr. p. 27); that they did not know what was in the boat (Tr. pp. 35-36), and that they had no search warrant. They searched the boat and found ten 10-gallon kegs of "white mule"; that the plaintiff in error was arrested; that he was not given warning as to his constitutional rights, and that he said he had been out with the boat all night (Tr. pp. 35-40).

I. From this evidence it is apparent that the officers had no grounds upon which to base this search and seizure. They very frankly admit they did not know who was in the boat and did not know that anything was in the boat—in fact, they didn't see anything in it. They also admit that after landing down the bay it would be impossible for a man to get out of there, yet, in the face of this situation, where it is perfectly apparent that a search warrant could easily be obtained, they took the law into their own hands and went down to the boat and arrested plaintiff in error illegally and then searched the boat without any authority of law and against the constitutional rights of plain-

tiff in error, as set out in assignment of errors 2, 4, 5 and 6.

There is nothing in this record to show that the officers had even a suspicion that any law of the United States was being violated. As far as the record is concerned, any citizen could have his rights violated with the same impunity. The mere fact that the result of this search was the finding of intoxicating liquor is not enough, under numerous decisions of this court and other courts, to justify the search.

It is plaintiff-in-error's contention that under the record the evidence was illegally seized and acquired; that plaintiff in error was compelled to supply evidence against himself and that the same was improperly admitted.

The fourth amendment to the Constitution of the United States provides:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

The Fifth Amendment further provides:

“No person * * * * shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

The following cases announce the principles that we are contending for:

United States vs. Slusser, 270 Fed. 819.

Hoyer vs. State, 193 N. W. 89.

Boyd vs. United States, 116 U. S. 616.

Weeks vs. United States, 232 U. S. 383.

Amos vs. United States, 255 U. S. 313.

Gouled vs. United States, 255 U. S. 298.

Snyder vs. United States, 285 Fed. 1.

Giles vs. United States, 284 Fed. 208.

United States vs. Ovaritius, 267 Fed. 227.

United States vs. Kaplan, 286 Fed. 973.

II. The Court erred in permitting the admission of testimony of the witness Mossman as to the conversation had with the plaintiff in error at the time of his arrest. The record affirmatively shows (Tr. p. 31-40) that the officers did not warn the plaintiff in error as to his constitutional rights as to making any statement. (Assignment of Errors III and VII.

It is true that the witness states that it was a voluntary statement, but that is merely a conclusion of the witness. It might not have been made if the officer had warned him of his constitutional right. In any event, it was the duty of the officer to warn him as to his constitutional rights. It being admitted that he failed to do so, the Court erred in admitting the statement.

United States vs. Kallas, 272 Fed. 742.

United States vs. Bell, 81 Fed. 830.

III. The first assignment of error is that the trial court was without jurisdiction to try the case on the complaint filed.

The Fifth Amendment to the Constitution provides that no person shall be held to answer for an infamous crime, except on presentment to a grand jury.

Section 10509, Comp. Stat., provides:

“All offenses which may be punishable by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors.”

The record in this case shows that plaintiff was sentenced to one year in jail and in addition thereto to pay a fine of \$1,000.00, in default of the payment

of which he should serve a term in jail not to exceed one day for each \$2.00 of said fine unpaid (Tr. p.53).

It is clear from this judgment that he may be imprisoned for more than one year under this sentence, and that he was denied the constitutional right of having this case presented to a grand jury before trial.

While we are aware that this court, in *Abbate vs. United States*, 270 Fed. 735, *Koppitz vs. United States*, 290 Fed. 96, and *Simpson vs. United States*, 290 Fed. 963, has held that the Alaska Bone Dry Law is valid, it appears from an examination of these cases that they were decided prior to the amendment to the National Prohibition Act of November 23, 1921 (c. 134, s. 5, 42 Stat. 223), or that this amendment was not called to the Court's attention, which provides:

“All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violation of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act.
* * *”

It will be noted that Congress in this amendment based the continuance of the then existing laws upon the one proposition that their provisions would still be in force except where such provisions were directly in conflict with any provision of the National Prohibition Act. That the Alaska Bone Dry Law is in direct conflict with the National Prohibition Act is clear. In the present case, under the National Prohibition law, plaintiff in error could only be fined \$500.00, yet the record in this case shows that he was sentenced to one year in jail and a fine of \$1,000.00—a direct conflict.

There is another conflict, the National Prohibition Act, which makes the possession of intoxicating liquor fit for beverage purposes a crime. What is White Mule? Is it an intoxicating liquor fit for beverage purposes?

If this court gives to the word “all,” as used in this amendment, its common, ordinary meaning, it must construe the same to mean every law, whether general or special. It means all laws passed by Congress, and both the Bone Dry Law and the Prohibition Act are such. A reading of Section 2 of the Amendment to the Constitution would indicate that this is the only construction that could

possibly be given to this amendment of 1921. There it is found that concurrent power to enforce is given to Congress and the several States, not to the Territory. It is going beyond the ordinary rules of construction to say that Congress intended that there should be two sets of laws for the same act in the same Territory, with different penalties. As we understand the rules of construction, it is that where there is a conflicting penalty, the lesser should be enforced.

Can it be said that the people of the United States, when they voted for the Eighteenth Amendment to the Constitution, intended that Congress or the courts should hold that a citizen of Massachusetts should be fined \$500.00 for the offense herein charged, and that a citizen of Alaska should go to jail for a year and pay a fine in addition of \$1,000.00 which, if he did not pay, he would have to work out at the rate of \$2.00 per day? In other words, the man in Massachusetts would on the same ratio spend 250 days in jail, while the man in Alaska would have to spend 865 days. We think not.

Again, Section 10138, 4-5a, Comp. Stat., provides:

‘This Act and the National Prohibition Act shall apply not only to the United States but to all territory subject to its jurisdiction.
* * * *’

Here is a declaration that is not found in the original Act. There is no exception. It is made to apply to “all territory subject to its jurisdiction.” Coupled with Section 10138 4/5c, *supra*, in which Congress declares that all laws shall continue in force “except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act and this Act,” it does not seem that there could be any question of what Act Congress intended should govern the trafficking in intoxicating liquors. In this amendment Congress has used the words “except such provisions of such laws as are directly in conflict with any of the provisions of the National Prohibition Act and this Act.” There is nothing in this language what would give to it or to the word “any” a construction different from the ordinary meaning.

We submit that it affirmatively appears from the language of the amendment that Congress intended that all violations of liquor laws under federal jurisdiction should be tried under the National Prohibition Act, and that the court was without

jurisdiction to try the plaintiff in error upon the complaint herein.

The record in this case shows that at the time of the trial there was an action pending against plaintiff in error under the National Prohibition Act for the same transaction. This standing alone would seem to indicate doubt on the part of the prosecuting officers as to whether the jurisdictional facts existed under the Alaska Dry Law.

IV. Assignments 9 and 10 relate to the trial court having overruled plaintiff-in-error's motion for an instructed verdict and in arrest of judgment. If our position upon the previous assignments herein discussed, or upon any of them, is correct, the error of the court below in refusing an instructed verdict of not guilty and in entering a judgment and sentence upon the verdict is manifest and need not be discussed.

For the errors committed we respectfully urge that plaintiff in error be granted a new trial.

Respectfully submitted,

JOHN F. DORE,

FRANCIS C. REAGAN,

L. V. RAY,

Attorneys for Plaintiff in Error.

In the
United States
Circuit Court of Appeals
For the Ninth Circuit
February Term, 1924.

C. F. PETERSON,

Plaintiff in Error

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error

No. 4147.

Upon Writ of Error to the United States District
Court for the Territory of Alaska, Third Division

Brief for Defendant in Error

SHERMAN DUGGAN, United States Attorney,
Valdez, Alaska

HARRY G. MCCAIN, Assistant U. S. Attorney,
Cordova, Alaska

For the Defendant in Error.

In the
United States
Circuit Court of Appeals
For the Ninth Circuit
February Term, 1924.

C. F. PETERSON,

Plaintiff in Error

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error

No. 4147.

Upon Writ of Error to the United States District
Court for the Territory of Alaska, Third Division

Brief for Defendant in Error

Statement of the Case

Appellant, C. F. Peterson was accused on September 21, 1922 of unlawful possession of whiskey commonly called "white mule," in violation of the Act

of Congress known as the Alaska Dry Law, before Hon. W. H. Rager in Commissioner's Court for Knik Precinct, Third Division, Territory of Alaska. The complaint by C. W. Mossman, Deputy United States Marshal, charging him is herein set forth:

"In the United States Commissioner's Court for Knik Precinct, Third Division, Territory of Alaska.

UNITED STATES OF AMERICA No.

vs.

C. F. PETERSON.

**"Complaint for the Violation of the Act of Congress,
Approved February 14th, 1917, Known as the
Alaska Dry Law.**

(Filed Sept. 21, 1922.)

C. F. Peterson is accused by C. W. Mossman, Deputy United States Marshal, in this complaint of the crime of having intoxicating liquor in his possession, committed as follows:

The said C. F. Peterson, on the 21st day of September, A. D. 1922, in Knik Precinct, in the Territory of Alaska, and within the jurisdiction of this Court, then and there being, did then and there wilfully and unlawfully have in his possession intoxicating liquor, to wit, whiskey, commonly called "white mule," in violation of the provisions of the Act of Congress, approved February 14th, 1917, commonly known as the Alaska Dry Law, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

(Signed) C. W. MOSSMAN.

United States of America,
Territory of Alaska, ss.

I, C. W. Mossman, being first duly sworn, upon oath depose and say that the foregoing complaint is true; and that I am a deputy United States marshal for the Third Division of the Territory of Alaska.

(Signed) C. W. MOSSMAN.

Subscribed and sworn to before me this 21st day of Sept., 1922.

(Seal)

(Signed) W. H. RAGER,

U. S. Commissioner and Ex-Officio Justice of the Peace."

On September 27, 1922, defendant was tried by said commissioner and Justice of the Peace, a jury having been waived, and was found guilty and sentenced to serve one year in jail and to pay a fine of \$1000.00. From this judgment and sentence defendant appealed to the District Court for the Territory of Alaska, Third Division, and was thereupon again tried, before a jury, on November 28, 1922, and convicted and was thereafter sentenced under such conviction on December 15, 1922, to one year in the federal jail at Anchorage, Alaska, and to pay a fine of \$1000.00. On this conviction defendant sues out this writ of error, containing ten assignments, which may be grouped as follows:

I.

Jurisdiction of the Court.

II.

Error in Admission of Evidence.

III.

Insufficiency of Evidence.

IV.

Error of Court in refusing Plea in Bar.

With the exception of the Plea in Bar the points raised in this case are identical with those raised in Number 4146, another appeal before this court by the same appellant. This brief is based upon the assignments of error and not upon the points of appellant's brief for the reason that the same has not been served. It is now the 10th day of February, and it will be impossible to await the service of such brief, which could not arrive for at least one week by the mail. The United States Attorney is required to be present in this court at San Francisco on March 5th. It will, therefore, be seen to await the arrival of such brief the Government would not have sufficient time by any means to prepare brief, have it printed, make the journey to San Francisco,

and file same three days before the case is called for argument, under the rule, hence, as before stated, the reason for basing this brief upon the assignments of error of appellant.

POINTS AND AUTHORITIES

Authority or right of any person other than officer to make complaint.

People vs. Stickle, (Mich) 121 NW 497

16 Corpus Juris, Page 289, Sec. 497.

State vs. Howard (NH) 43 Atl. 592.

United States vs. Skinner, 27 Fed. Cas. No. 16,309.

State vs. Giles (Maine) 64 Atl. 619.

Com. vs. Murphy, (Mass.) 18 NE 418.

Com. vs. Alden (Mass.) 9 NE 15.

State vs. Woodmanse, (R. I.) 35 Atl. 961.

Wooten vs. State, (Tex) 121 SW 703.

A person convicted of violating the Alaska Dry Law, an Act of Congress approved February 14, 1917, cannot (1) be imprisoned in the penitentiary nor at hard labor; cannot (2) be imprisoned for a longer term than one year on a single charge; therefore (3) the offense is a misdemeanor, and can (4) be prosecuted under an information or complaint, as well as by indictment of a Grand Jury.

(1) **Alaska Dry Law**, Sections 1, 24, etc.

In Re Mills, 135 U. S. 263.

- In Re Bonner**, 151 U. S. 242.
Horner vs. State, 1 Oreg. 267.
Brooks vs. People, 24 Pac. 553 (Col.)
- (2) **Alaska Dry Law, Sections 1, 24, etc.**
Ex Parte Jackson, 96 U. S. 727.
In Re MacDonald, 33 Pac. 20 (Wyo.)—distinguishing **Ex Parte Rosenheim**, 23 Pac. 372 (Cal.)
State vs. Baxter 21 Pac. 650 (Kan.)—citing in **Re Boyd**, 9 Pac. 240.
Ex Parte McGee, 54 Pac. 1091 (Oreg.)
In Re Newton, 58 N. W. 436 (Neb.)
Ex Parte Bryant, 4 S. 854 (Fla.)
Bailey vs. State, 6 S. 398 (Ala.)
Ex Parte Bolling, 31 Ill. 96
Davis vs. State, 22 Ga. 101.
- (3) **Alaska Dry Law, Sections 1, etc.**
Compiled Laws of Alaska, 1913, Section 2065.
Act of March 4, 1909, C. 321, Sec. 336, 35 Stat. 1152; **Barnes Federal Code**, Sec. 10,038.
- (4) **Alaska Dry Law, Sections 18 and 28.**
U. S. vs. Powers and Robertson, 1 Alaska 180, and cases cited on page 184.
John H. Breede vs. James M. Powers, U. S. Marshal, Sup. Ct. No. 45—Oct. Term, 1923 (Unreported to date).
Young vs. U. S. 272 Fed. 967 (9th Cir.)
U. S. vs. Achen, 267 Fed. 595 (E. D., N. Y.)
U. S. vs. Quaritus, 267 Fed. 227.
U. S. vs. Metzgar, 270 Fed. 291.

The Congress of the United States has authority to pass legislation making the possession of intoxicating liquor a crime, and the Alaska Dry Law is valid.

- Binns vs. United States**, 194 U. S. 490-1.
Street vs. Lincoln Safe Deposit Co. (S. D. N. Y.)
 267 Fed. 706—See also same in 254 U. S. 88.
Rose vs. U. S. (6th Cir.) 274 Fed. 245.
U. S. vs. Murphy, (E. D. N. Y.) 264 Fed. 842.
Massey vs. U. S. (8th Cir.) 281 Fed. 293.
Page vs. U. S. (9th Cir.) 278 Fed. 41.
Jacob Ruppert vs. Caffey, 251 U. S. 264.
Abbate vs. U. S. (9th Cir.) 270 Fed. 735.
Simms vs. Simms, 175 U. S. 168.
Mormon Church vs. United States, 136 U. S.
 1-42.
National Bank vs. County of Yankton, 101 U.
 S. 129-132.
Koppitz vs. United States, 272 Fed. 96.

The complaint under which defendant was convicted states facts sufficient to constitute a crime.

- Cabiale vs. U. S.** (9th Cir.) 276 Fed. 769, see
 par. 2.
Young vs. U. S. (9th Cir.) 272 Fed. 967.
Massey vs. U. S. (8th Cir.) 281 Fed. 293.
Heitler vs. U. S. (7th Cir.) 280 Fed. 703.
Strada vs. U. S. (9th Cir.) 281 Fed. 143.
Laurie vs. U. S. (6th Cir.) 278 Fed. 934.
Feigin vs U. S. (9th Cir.) 279 Fed. 107.
U. S. vs. Everson (S. D. Fla.) 280 Fed. 126, dis-
 tinguishing Dowling case
Vesely vs. U. S. (9th Cir.) 275 Fed. 693.
Millich et al. vs. U. S. (9th Cir.) 282 Fed. 604.
Herine vs. U. S. (9th Cir.) 276 Fed. 806.
Kathriner vs. U. S. (9th Cir.) 276 Fed. 808.

A search warrant is unnecessary to search an automobile, boat or other vehicle where the officer mak-

ing the search has reasonable grounds to believe that contraband intoxicating liquors are being carried therein.

- Lambert vs. U. S.** 282 Fed. 413 (9th Cir.)
U. S. vs. Bateman, 278 Fed. 231 (S. D. Cal., N. D.)
U. S. vs. Fenton, 268 Fed. 221 (D. Mont.)
Boyd vs. U. S., 286 Fed. 930 (4th Cir.)
Bell vs. U. S., 285 Fed. 145 (5th Cir.)
McBride vs. U. S., 284 Fed. 416 (5th Cir.)
U. S. vs. Rembert, 284 Fed. 996 (S. D. Tex.)
Houck vs. State, 140 N. E. 112 (Ohio).
Elrod vs. Moss, 278 Fed. 123 (4th Cir.)
Vachina vs. U. S., 283 Fed. 25 (9th Cir.)
U. S. vs. Snyder, 278 Fed. 650 (N. D., W. Va.)
O'Connor vs. U. S., 281 Fed. 396 (D., N. J.)
U. S. vs. Vatune, 292 Fed. 497 (N. D. Cal., S. D.)
Ex Parte Morrill, 35 Fed. 261 (Cir. Ct. Oreg.)
U. S. vs. Welsh, 247 Fed. 239 (S. D., N. Y.)

Statements and conversations made to a Deputy U. S. Marshal or other officer, either before or after arrest, which were voluntary, and not induced by duress, intimidation or other improper influences, are admissable, and the officer may testify to them at the trial.

- Perovich vs. U. S.**, 205 U. S. 86.
Wilson vs. U. S., 162 U. S. 613.
Mangum vs. U. S., 289 Fed. 213 (9th Cir.)
Murray vs. U. S., 288 Fed. 1008 (Ct. of App., D. C.)
Murphy vs. U. S., 285 Fed. 801 (7th Cir.)

Wiggins vs. U. S., (2nd Circuit) 272 Fed. 41.
State vs. Brinkley, 105 Pac. 708 (Oreg.)
State vs. Crowder, 21 Pac. 208 (Kan.) See Par.
2 and cases there cited.

Admissions admitted by trial Judge in the exercise of his discretion will not be disturbed unless there is apparent and manifest error.

Rogoway vs. State, 78 Pac. 987.
State vs. Humphrey et al 128 Pac. 824 (Oreg.)
State vs. Morris, 163 Pac. 567 (Oreg.) See par.
5-6.
Mangum vs. U. S. 289 Fed. 213 (9th Cir.)

The Court, in the instructions to the jury, correctly stated the law of "possession"; there was "substantial" evidence that defendant was the possessor of the intoxicating liquor; the weight of the evidence is for the jury, and Appellate Courts will not disturb the verdict.

Compiled Laws of Alaska, 1913, Sec. 2266.
Rev. St. Sec. 1011, Comp. St., Sec. 1672.
Page et al vs. U. S. (9th Cir.) 278 Fed. 41.
Rose vs. U. S. (6th Cir.) 274 Fed. 245.
Waddel vs. U. S. (8th Cir.) 283 Fed. 409.
Laurie vs. U. S., 278 Fed. 934 (6th Cir.)
Penn Casualty Company vs. Whiteway et al,
210 Fed. 782 (9th Cir.)

A plea in bar claiming merger can only be made

after a conviction. There can be no merger of offenses of same grade.

Section 2209 Alaska Code

16 Corpus Juris, Page 59, Sec. 10.

Vol. 1 Whart Crim. Law, Page 50, Sec. 39.

Berkowitz vs. United States, 93 Fed. 452.

Sec. 1, Alaska Dry Law.

Sec. 26, Title 2, Natl. Pro. Act.

Brewster vs. State, (Ind.) 151 NE 54.

ARGUMENT

Appellant questions the sufficiency of the complaint in this case on the ground that C. W. Mossman does not sign the complaint in an official capacity. In the first place we think the contention is without merit for he has made the complaint as deputy marshal. In the very first paragraph (Record page 6) defendants are accused "by C. W. Mossman, Deputy United States Marshal." This is repeated in the verification, but assuming that he has not sufficiently described himself, he has the same right as any other person to make complaint. Section 27 of the Alaska Dry Law makes it the duty of certain officials to enforce the Act, among them, of course, marshals and deputies, but nowhere can it be shown that they are given exclusive jurisdiction of making complaints,

and unless they are given exclusive jurisdiction, anyone can make a complaint.

16 Corpus Juris, Page 289, Sec. 497, states that the rule that complaints may be made by any person is of long standing and further, on page 290 in the same section is the following language:

“But the mere fact that certain officers are authorized to make complaint does not necessarily give them the exclusive right to do so.”

In *People vs. Stickle*, Mich. 121 N. W. 498, a well considered case where defendant was convicted of wife desertion, it is contended that only the Superintendent of the poor could make the complaint, the court said:

“And the rule that one who is a competent witness and has knowledge of the facts may make complaint in a criminal case, permits the wife to be the complaining witness in this case. No good reason has been suggested for holding that because a superintendent of the poor or a county agent may make the complaint, it was intended to give them the exclusive right to initiate proceedings.”

In *State vs. Howard* (N. H.) 43 Atla. 592, where defendant was charged with keeping a dog without a license in violation of a State Law, wherein the Mayor of each City and the selectmen of each town are required to make complaint against owners or

keepers, it was contended that no other persons could make complaints, that the court held:

“Any person may make a complaint under Section 8 or kill an unlicensed dog under Section 11, but it is a special duty of the officers to whom warrants have been issued to do both and again it is the general policy of the laws that any person who has probable cause for believing that another has committed a crime shall be at liberty to make complaint against the defendant.”

For these reasons, that the complaint does show the signature of the officer, also that anyone can sign the complaint who knows the facts, we contend that the proposition is entirely without merit.

The Alaska Dry Law in Section I and all other parts of the Act specifically states that a violation of the provisions of the Act is a misdemeanor and in Section 28, which provides the machinery for prosecutions of violations of the Act, we find the following:

“Section 28. That prosecutions for violations of the provisions of this Act shall be on information filed by any such officer before any justice of the peace or district judge, or upon indictment by any grand jury of the Territory of Alaska, and said United States district attorney or his deputy shall file such information upon the presentation to him or his assistants of sworn information that the law has been violated; and in such prosecutions anyone making a false oath to any material fact shall be deemed guilty of perjury.”

It seems, in view of the above provision and the long line of decisions interpreting statutes whose terminology is similar to that found in the Alaska Dry Law, that there is no doubt about the class of offense committed by a violation of the provisions of the Act, nor about the method of prosecuting such offenses. But plaintiff in error contends that error was committed in that he was tried under a criminal information and not by an indictment returned by a Grand Jury. The Supreme Court of the United States has long held that one convicted of a crime cannot be imprisoned in the penitentiary nor at hard labor unless the Act under which the prosecution is had specifically provides and authorizes that manner of imprisonment. This principle was laid down in the case of *In Re Mills*, 135 U. S. 263, where the court, page 270, says:

“A sentence simply of ‘imprisonment’ in the case of a person convicted of an offense against the United States—where the statute prescribing the punishment does not require that the accused shall be confined in the penitentiary—cannot be executed by confinement in a penitentiary, except in cases in which the sentence is for a period longer than one year.”

In the case of *In Re Bonner*, 151 U. S. 242, this principle is again laid down and *In Re Mills* cited

with approval. On pages 254 and 255, the Court says:

“It follows that the court had no jurisdiction to order an imprisonment, when the place is not specified in the law, to be executed in a penitentiary when the imprisonment is not ordered for a period of longer than one year at hard labor.”

Section 2065, Compiled Laws of Alaska, 1913, defines a misdemeanor as a crime not punishable by death or by imprisonment in the penitentiary, and Section 336, Chap. 321 of the Act of March 4, 1909, (35 Stat. 1152) is to the same effect in that it defines a misdemeanor as a crime not punishable by death nor by imprisonment for a term exceeding one year, the statute reading as follows:

“All offenses which may be punished by death or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors.”

Indeed it seems to be the contention of plaintiff in error that a violation of the provisions of the Alaska Dry Law constitutes a felony or infamous crime, and, therefore, that the offender may be prosecuted only by the indictment of a grand jury, on the ground that imprisonment under the Alaska Dry Law may be for a period exceeding one year. But the Act

itself specifically and clearly states otherwise. Nowhere throughout the Act is a penalty of imprisonment for more than one year provided. So that appellant's contention seems to rest upon the supposition that where a sentence of imprisonment in jail for a term of one year is administered, and in addition to that a fine is assessed, that the total term of imprisonment might be more than a year in case the defendant should be imprisoned for the purpose of collecting the fine.

The courts of the United States have held uniformly in a long line of decisions that imprisonment because of non-payment of a fine is merely a method of enforcing the payment of the fine and constitutes no part of the penalty administered for the violation of the law.

In *Ex Parte McGee*, 54, Pac. 1091, the Supreme Court of Oregon held that imprisonment to enforce the payment of a fine is no part of the penalty itself, stating its decision in the following words:

“The imprisonment is merely a prescribed mode of enforcing the payment of the fine, and, as we have seen, constitutes a step in the code of criminal procedure to be pursued in all cases involving the imposition of a fine. The punishment permitted by the charter and fixed by the ordinance is imprisonment or fine, or both. All beyond is mere mode or man-

ner of enforcement. The first can only be satisfied by serving out the prescribed term in prison, while the latter may be satisfied by payment of the fine imposed; but for the coercion of that payment the statute has prescribed a mode of procedure, which is to commit the accused to prison for a term not exceeding one day for every two dollars of the fine. The mode and manner of enforcing the punishment should not be confounded with the punishment itself, or regarded as a part of it."

In a case brought under the National Prohibition Act this Court, in *Young vs. United States*, 272 Fed. 967, held that the offense charged was a misdemeanor and was rightfully prosecuted by information, holding that this is the established law of the Federal jurisdiction. And since then the Supreme Court of the United States in the case of *John H. Brede vs. James M. Powers*, decided, on October 22, 1923, No. 45, October Term, 1923, (not reported to date) that prosecutions under the National Prohibition Act may be brought by information, since the offense is not infamous, and since the Act itself authorizes prosecution by information.

It will be noticed that in the Brede case an offense under the National Prohibition Act was involved. Under that Act the punishment may, under some conditions be imprisonment up to a period of five years.

The case at bar involves an offense under the

Alaska Dry Law, which does not authorize imprisonment in a penitentiary nor at hard labor, and the Alaska Dry Law differs from the National Prohibition Act in respect to the length of possible imprisonment by making one year the maximum. This, it seems to us, brings the case at bar squarely within all the decisions holding that offenses under similar acts may be prosecuted by information.

Constitutionality or Legality of the Alaska Dry Law.

Appellant in his first assignment of error claims Congress is without authority to pass legislation making the possession of intoxicating liquor an offense. This matter we think has been disposed of by this court, but we desire to call the attention of the court to the case of *Binns vs. United States*, 194 U. S. 490-1, as follows:

“It must be remembered that Congress, in the government of the Territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the constitution, that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the Territories.”

This is a case arising under the Act of Congress imposing trade licenses on certain businesses from Alaska.

In *Simms vs. Simms*, 175 U. S. 168, involving an action for divorce for want of jurisdiction, the court said:

“In the Territories of the United States, Congress has the entire dominion and sovereignty, national, and local, Federal and state, and has full legislative power over all subjects upon which the legislature of a state might legislate within the state.”

In *Mormon Church vs. United States*, 136 U. S. 1-42, involving the abrogation of charter of the Mormon Church under Act of Congress, the court said:

“The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the Territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the Territory or other property belonging to the United States.”

National Bank vs. County of Yankton, 101 U. S., 129-132, involving the right of counties and townships under a Dakota Territorial Act to vote bonds. The court said:

“Their relation to the general government is much the same as that which counties bear to the respective states, and Congress may legislate for them as a state does for its municipal organizations.”

In the case of *Abbate vs. United States*, 270 Fed.

275, this court held the Bone Dry Law in force in the Territory of Alaska, the court saying:

“In enacting the Bone Dry Law * * * Congress was pursuing its policy of prohibition in Indian Territory.”

In *Koppitz vs. United States*, 272 Fed. 96, this court again upheld the Alaska Bone Dry Law and declared it in force.

As shown by the foregoing cases and many others Congress has plenary power to legislate upon all matters of government for a territory. If the contention be that they have not, then who has? Many territories and in fact almost all of them have been governed by congressional legislation for years after their acquisition and no legislature organized or authorized. If they did not have authority over this subject, then it would exist nowhere because Congress is the sole repository of legislative power in Territories. Certainly the organization of the legislature under Congressional law would not change the matter for the legislature derives no authority except that conferred by Congress.

As to constitutionality of such legislation, the foregoing cases show that this power has been settled and legislated upon by Congress for many years.

We therefore think the contention is without merit.

ADDENDUM

Since the preparation of this brief and after the same is in the hands of the printers the following information was received by wire from attorney for Plaintiff in Error:

“Will contend both cases: amendment National Prohibition Act November twenty-three, Nineteen Twenty One, supersedes Alaska Bone Dry Law.”

The phrase “both cases” above evidently refers to this case and to case No. 4146, also before this court, by the same appellant. The Amendment to the National Prohibition Act, approved November 23, 1921, is the “Act Supplemental to the National Prohibition Act,” commonly called the Anti-Beer Bill.

It is hard to see on what grounds it can be claimed that the Act Supplemental to the National Prohibition Act supersedes the Alaska Dry Law. Section I of the Amendment is a section of definitions. Section 2 of the Amendment provides that only spirituous and vinuous liquors may be prescribed for medicinal purposes, and relates to the conditions under which such may be shipped into the United States for non-beverage purposes. Section 3 applies the Amendment and the National Prohibition Act to the Territories, specifically mentioning Hawaii and the Virgin Islands, and

confers jurisdiction on their courts. Section 4 grants authority to the commissioner to formulate regulations to make the Amendment effective. Section 5 provides that all laws relating to the regulation and taxation of the traffic in intoxicating liquors that were existent at the time the National Prohibition Act was enacted shall continue in force and effect—unless the same are directly in conflict with that act or with the Amendment. Section 6 provides penalties for illegal searches in certain cases, etc.

Since the Alaska Dry Law itself provided only for the use of “pure alcohol” for “scientific, artistic or mechanical purposes or for compounding or preparing medicines,” (Sections 2, 3, 4, 5, 6, 7, 10, 11, 12, Alaska Dry Law) and “wine for sacramental purposes,” (Sections 8 and 9, Alaska Dry Law) and, hence, by its terms, exclusions and prohibitions made prescribing beer for medicinal purposes illegal, it is quite evident that the principal purpose of the Supplemental Act can have no repealing effect on the Alaska Dry Law.

If, by some stretch of imagination, Section 3 of the Amendment is claimed to effect the validity of the Alaska Dry Law, we contend that the answer is obvious. It has never been questioned that the National Prohibition Act applied to Alaska. It was con-

tended in *Abbate vs. U. S.*, 270 Fed. 735, and in *Kopitz vs. U. S.*, 272 Fed. 96, that the Alaska Dry Law was repealed by the National Prohibition Act, but it was never maintained that the National Act did not apply to the Territory of Alaska. This court in deciding those two cases not only held that the Alaska Dry Law was not repealed by the National Prohibition Act and is, therefore, still in effect, but held distinctly that **both** laws are in effect in Alaska. So that Section 3 of the Act Supplemental to the National Prohibition Act in specifically applying the Volstead Act to Hawaii and the Virgin Islands and "all territory subject to its (the United States') jurisdiction" could not possibly bring the Alaska Dry Law and the National Prohibition Act into any new relationship or conflict whereby the Alaska Dry Law is superseded by the latter.

Section 5 of the Amendment was passed specifically for the purpose of providing that certain laws were NOT REPEALED by the National Prohibition Act and has reference especially to certain Internal Revenue Laws which some of the courts had held were repealed by the National Prohibition Act. The Alaska Dry Law contained no such tax provisions, hence no new construction is needed on that score.

Section 6 provides penalties for searching a private

dwelling without a warrant, making malicious searches, and for impersonating an officer of the United States. If there were anything in the Alaska Dry Law contrary to that provision, the repealing effect of the Amendment would, under the holding of this court in *Abbate vs. United States*, *supra*, extend only to the inconsistency or direct conflict. But we hold that there is absolutely no conflict or inconsistency.

Certainly Sections 1 and 4 cannot be claimed to have any repealing effect on the Alaska Dry Law, hence we contend that appellant's contention is entirely without merit.

II.

Error in Admission of Evidence.

Error is assigned upon the action of the trial court in admitting the liquor which had been seized, in evidence, without a search warrant and allowing the witnesses to testify regarding same. The claim is urged under the fourth and fifth amendments of the constitution (Record page 61, 62, 63, 27, 37). As the court well knows the question to be determined is whether the search is an unreasonable one. There is no guarantee in either the fourth or fifth amendments against searches of vehicles, either reasonable or unreason-

able, the protection afforded being given to persons and houses, papers and effects. It was for the court below and for this court here to determine whether the search was an unreasonable one in view of all the facts and the evidence. The evidence shows that Deputy United States marshals Mossman, Watson and Hoffman, on the 21st of September, 1922, about 7 o'clock in the morning, sighted a rowboat with a single occupant (Record page 26, 27). The boat landed at the dock at Anchorage and the occupant came ashore and left immediately, taking the boat back into the stream and going down the Bay three or four miles and landing there (Record page 27). The actions of the occupant of the boat on landing at the dock were suspicious and aroused the suspicions of the officers (Record page 33, 34). Defendant was observed by the officers with a pair of glasses when he landed, carrying something ashore. He also built a fire, (Record page 34). The marshals then proceeded down the Bay to the point where the boat landed and found defendant asleep on the bank, twenty-five or thirty yards from the boat (Record page 36) which was then high and dry on the beach (Record page 28). After observing the defendant, without waking him, two of the officers went to the boat, which was an open dory, (Record page 28). They

found the boat loaded with kegs of whiskey, part of which were uncovered and in plain sight, (Record page 29 and 36) about ninety gallons, (Record page 29 and 36). Defendant stated to witness, deputy marshal Watson, (Record page 40) that he had "a hundred gallons" in the boat.

The question, as stated before, is a judicial one as to whether the acts by which the evidence was obtained constitute an unreasonable search. The evidence shows, as above stated, that the liquor was in the boat which had been used by defendant, near which he was sleeping; that the boat was an open one and the liquor plainly visible. We contend, therefore, that on the statement of facts, which defendant produced no testimony to deny, no search was necessary as the liquor, which constitutes the evidence of crime was in plain sight and could be viewed by anyone who could see. This was the view held by this court and sustained by the following cases decided in the District Courts in this circuit and in this court.

In *United States vs. Fenton*, 268, Fed. 221, from the District of Montana, which was a charge of transporting in an automobile, the court says:

"An unlawful arrest of an offender does not work

a pardon in his behalf, and seizure without process and by force of government property, of which it is entitled to immediate possession, does not entitle the offender to a return of the property, nor to exclusion of its use in evidence against him. The auto and whiskey, by virtue of the National Prohibition Act (41 Stat. 305), were forfeited, and thereby transferred to the United States, the moment defendants embarked upon the unlawful transportation. The United States was then vested with the right of property and possession. Even as any other owner of property in like circumstances at common law, the United States without process could recover possession by force. And however, if at all, irregularly the officers proceeded, the defendants have no right to return of the property, nor to object to its use in evidence, whatever other, if any, right or remedy they may have."

In *Lambert vs. United States* 282 Fed. 413, the case of transporting in an automobile. In this case the court says:

"The prohibition of the Fourth Amendment is against all unreasonable searches and seizures. Whether such search or seizure is or is not unreasonable must necessarily be determined according to the facts and circumstances of the particular case. We think the actions of the plaintiff in error in the present case, as disclosed by the testimony of Edison, were of themselves enough to justify the officers in believing that Lambert was at the time actually engaged in the commission of the crime defined and denounced by the National Prohibition Act, and that they were therefore justified in arresting him and in seizing the automobile by means of which he was committing

the offense—just as peace officers may lawfully arrest thugs and burglars, when their actions are such as to reasonably lead the officers to believe that they are actually engaged in a criminal act, without giving the criminals time and opportunity to escape while the officers go away to make application for a warrant.”

In *United States vs. Bateman*, 278 Fed. 231, where an auto was stopped without a warrant, and on a motion for return of the property, seized, the court held:

“It is my opinion, therefore, that it is not unreasonable for a prohibition enforcement officer to stop automobiles upon the public highway and search them for intoxicating liquors without a warrant, and the finding of the liquor justifies the search.”

In *United States vs. Vatune*, 292 Fed. 492 on motion for return of liquor seized without warrant and to quash information, the district court for the Northern District of California, S. D., in a well considered case denied the motion. In the above case the defendant was driving along the street with the liquor well concealed in his auto, according to the testimony of the defendant. The government contended that the liquor was in sight. The court, in denying the motion for return of the liquor used the following language:

“The Fourth Amendment affords inviolable pro-

tection to the people with respect to 'their persons, houses, papers, and effects, against unreasonable searches and seizures.' What is an 'unreasonable' search or seizure is always a judicial question (*United States vs. Bateman* (D. C.) 278 Fed. 231, 232), and is determinable from a consideration of the circumstances involved. Officers of the government act under legal authority, in pursuance of oath and official station, and it will be presumed, in the absence of countervailing proof, that they have performed their duty—that is, that they have not been guilty, in a given instance, of making an unreasonable search or effecting an unreasonable seizure. The burden of showing the contrary, then, is upon him who contends to the contrary."

We contend that it is apparent from the evidence of the Government that the kegs of whiskey were in plain sight of the officers in the boat and they were justified in seizing it, being a crime committed in their presence. We further contend that the admission of the defendant that he had a "hundred gallons" gave the officers complete evidence and authority upon which to seize the contents of the boat. A search, if required, presupposes the secretion of the article involved, but in this case no search was required; first, because the liquor was in plain sight; second, because of the admission of defendant that he had a hundred gallons.

The court's attention is directed to the fact that this is not a prosecution under the Volstead Act, but

under the Alaska Bone Dry Law. We fail to find in the record any petition for the return of the liquor or its suppression, and we, therefore, contend that the objection, if valid, came too late as the court will not ordinarily interrupt **a trial to inquire into** any collateral issue.

Error is assigned because the court allowed the witness Watson (Record page 40) to testify to certain statements made by defendant while under arrest, appellant contending that the law of confessions governs such statements. The only testimony covered by the question of arrest is that on Record Page 40 in which appellant's attorney on the trial asked the witness Watson this question:

“Q. Had you placed him under arrest?

A. No sir.

Q. Was he under arrest while you were talking to him?

A. I don't know that I told him he was.”

It is apparent from the facts that the appellant at that time had not been taken into custody but the deputy marshal merely stayed with him while the other officers went down to look at the boat. We, therefore, contend that the evidence does not justify the claim of arrest at this time; but if it be contended that there was an arrest, we maintain that its admission was proper and not error.

Reference is again made to the testimony as to what the conversation was (Record page 40).

“Q. What statements, if any, did Mr. Peterson make to you at that time?

A. Well, he was about all in he said; he had been out all night shooting ducks and had no sleep for two days. He was all in; played out.

Q. Did he say anything about what was in the boat?

A. I don't remember whether he said anything about the booze. I don't remember just what it was. Yes, I remember; I said , 'have you anything in the boat,' and he said, 'a hundred gallons.' ”

In the case of Perovich vs. United States, 205 U. S. 91, passing upon the same question in a homicide case, the court says:

“Again, it is alleged that there was error in overruling a motion made by defendant to strike out all the testimony given by a deputy marshal of conversations between him and the defendant. As these conversations were not induced by duress, intimidation or other improper influences, but were perfectly voluntary, there is no reason why they should not have been received.”

In Wilson vs. United States, 162 U. S. 623, also a homicide case, this question was considered at much greater length than in the case quoted above, and the same conclusion reached, the court saying:

“In the case at bar defendant was not put under

oath, and made no objection to answering the questions propounded. The commissioner testified that the statement was made freely and voluntarily, and no evidence to the contrary was adduced. Nor did defendant when testifying on his own behalf testify to the contrary. He testified merely that the commissioner examined him 'without giving him the benefit of counsel or warning him of his right of being represented by counsel, or in any way informing him of his right to be thus represented.' He did not testify that he did not know that he had a right to refuse to answer the questions, or that, if he had known it, he would not have answered. His answers were explanations, and he appeared not to be unwilling to avail himself of that mode of averting suspicion. It is true that, while he was not sworn, he made the statements before a commissioner who was investigating a charge against him, as he was informed; he was in custody but not in irons; there had been threats of mobbing him the night before the examination; he did not have the aid of counsel; and he was not warned that the statement might be used against him or advised that he need not answer. These were matters which went to the weight or creditability of what he said of an incriminating character, but as he was not confessing guilt but the contrary, we think that, under all the circumstances disclosed, they were not of themselves sufficient to require his answers to be excluded on the ground of being involuntary as matter of law."

Mangum vs. United States, 289 Fed. 213 is a case decided by this court, the principle question under consideration being the admisability of statements made by the defendant. The rule laid down is the same as was announced in the preceeding cases,

but in addition to that we desire to call the court's attention to the following statement:

“But where on the trial of a criminal case a confession of the defendant is offered in evidence it becomes necessary for the trial court to ascertain and determine as a preliminary question of fact, whether it was freely and voluntarily made, and whether the previous undue influence, if any, had ceased to operate upon the mind of the defendant. In doing so, the court is necessarily vested with a very large discretion, which will not be disturbed on appeal, unless a clear abuse thereof is shown. *State vs. Rogoway*, 45 Or. 601, 78 Pac. 987; 81 Pac. 234, 2 Ann. Cas. 431; *State vs. Squires*, 48 N. H. 364.”

The evidence in the case at bar shows conclusively that the statements admitted in testimony were voluntarily made by the defendant and that no duress, intimidation or promises were in any way responsible for them. We therefore contend that the objection to their admission was entirely without merit.

III.

Insufficiency of Evidence.

The evidence in this case has been necessarily covered more or less in the discussion of questions covered in the preceding pages. Appellant's contention raised by Assignment of Error Number 8, states that there was no evidence to prove ownership of the

liquor by appellant; no testimony of ownership of the boat by appellant; and no testimony to connect the defendant with the commission of the offense. It is our contention that the testimony on these points was so conclusive that the only manner in which the jury could have escaped returning a verdict of guilty was to disbelieve all the testimony of all the officers. No testimony was introduced for defendant. The attention of the court, however, is directed to the transcript of evidence bearing on these points. The testimony of the witness Hoffman of the action of appellant at the Anchorage dock (Record page 26); of his going down the Bay about three miles and landing (Record page 27); finding of appellant asleep on the bank (Record page 27); finding the open boat in which he had previously been seen, about sixty feet from where defendant was sleeping, containing ten 10-gallon kegs of "white mule" (Record pages 28, 29 and 30); that the liquor found was intoxicating liquor (Record page 30); to the testimony of witness Mossman as to the actions of appellant in the vicinity of the Anchorage dock (Record page 33, 34); of his going down the Bay and landing; of them seeing him land with the boat on the bank (Record page 34); of going to the place of landing and finding him asleep (Record page 35); finding the boat about 30

yards from appellant and finding ten 10-gallon kegs of whiskey therein (Record page 36); to the testimony of the witness Watson observing a boat in the vicinity of the ocean dock (Record page 38); going down the Bay and landing and building a fire (Record page 39); finding defendant asleep there (Record page 39). Especially the attention of the court is called to the voluntary statement of appellant (Record page 40) in which he said in answer to a question as to whether he had anything in the boat, "a hundred gallons;" and to the statement of witness Watson (Record page 41) that it was white mule whiskey. We contend the ownership of the boat was immaterial. The possession of the boat appellant admitted in a conversation with witness Watson (Record page 40) in which he said he had been out all night shooting ducks and that he had 35 or 40 ducks in the boat; also to witness Hoffman (Record page 31). These facts we contend clearly establish the material elements of guilt and we think the evidence is amply sufficient in all respects for the foundation of the verdict and judgment.

IV.

ERROR OF COURT IN REFUSING PLEA IN BAR

Under his first assignment of error appellant con-

tends for the doctrine of merger. This was sought to be raised before trial by an affidavit in support of plea in bar (Record pages 19 and 23). In the first place the court's attention is called to the fact that no such plea as that attempted to be put in is provided for by the Alaska Code; section 2209 sets forth what pleas may be entered. First, plea of guilty; second, plea of not guilty; third, a plea of former conviction or acquittal in the court, naming it, and place, naming it, and giving the date. In the case at bar, from an inspection of appellant's affidavit, it appears that no trial of any kind had been had. Appellant could neither have been convicted nor acquitted. The doctrine of merger can only apply, if it prevail at all, where one has been tried or acquitted upon a felony which includes a crime of a lesser degree. Nothing is shown by the record as to what became of the case mentioned in defendant's affidavit.

As to the law of merger, 16 Corpus Juris, speaking of merger, page 59, section 10, says:

“Moreover the offenses must be of different grades and the rule does not apply where both offenses are felonies or misdemeanors.”

In Vol. 1 Wharton's Criminal Law, page 50, Sec.

39, the same doctrine is laid down, using the following language:

“Merger is said to exist when a lesser offense is absorbed in a greater, but in criminal practice the only case in which such absorption is claimed to be operative is when a misdemeanor is an ingredient of a felony, in which case the older authorities maintain that the trial must be exclusively for the felony, and that the defendant cannot, under an indictment for felony, be convicted of misdemeanor.”

Section 1, third sub-division of the Alaska Dry Law, under which this action is brought, makes possession of liquor a misdemeanor providing not more than one year's imprisonment or more than \$1000.00 fine or both. The same section makes transportation of liquors a misdemeanor with the same penalty. By reference to defendant's affidavit (Record page 19 and 20) he alleges he is held to answer before the grand jury on a charge of unlawfully transporting liquors under the National Prohibition Act. Since there is no showing that it is a second offense charged, the penalty under section 29 is a fine of \$500.00 and no imprisonment. Therefore, both offenses are misdemeanors and there is no merger.

In Berkowitz, 93 Fed. Rep. 452, in the Third Circuit, defendant was accused of conspiracy to utter false naturalization certificates. He was acquitted.

He was later accused of the offense of uttering in the same transaction and pled in bar his former acquittal. The court over-ruled the plea saying:

“The doctrine of merger is not applicable as between misdemeanors.”

In *Brewster vs. State*, (Ind.) 115 N. E. 54, the defendant and others were accused of a conspiracy to burn a building, the evidence tending to show that defendant was also guilty of the crime of arson. In other words the object of the conspiracy was consummated and merger was contended for, and the court held:

“The doctrine of merger of offenses can have no application where, as in this case, the two crimes are of equal grade and it rests with the State to elect which it will prosecute.”

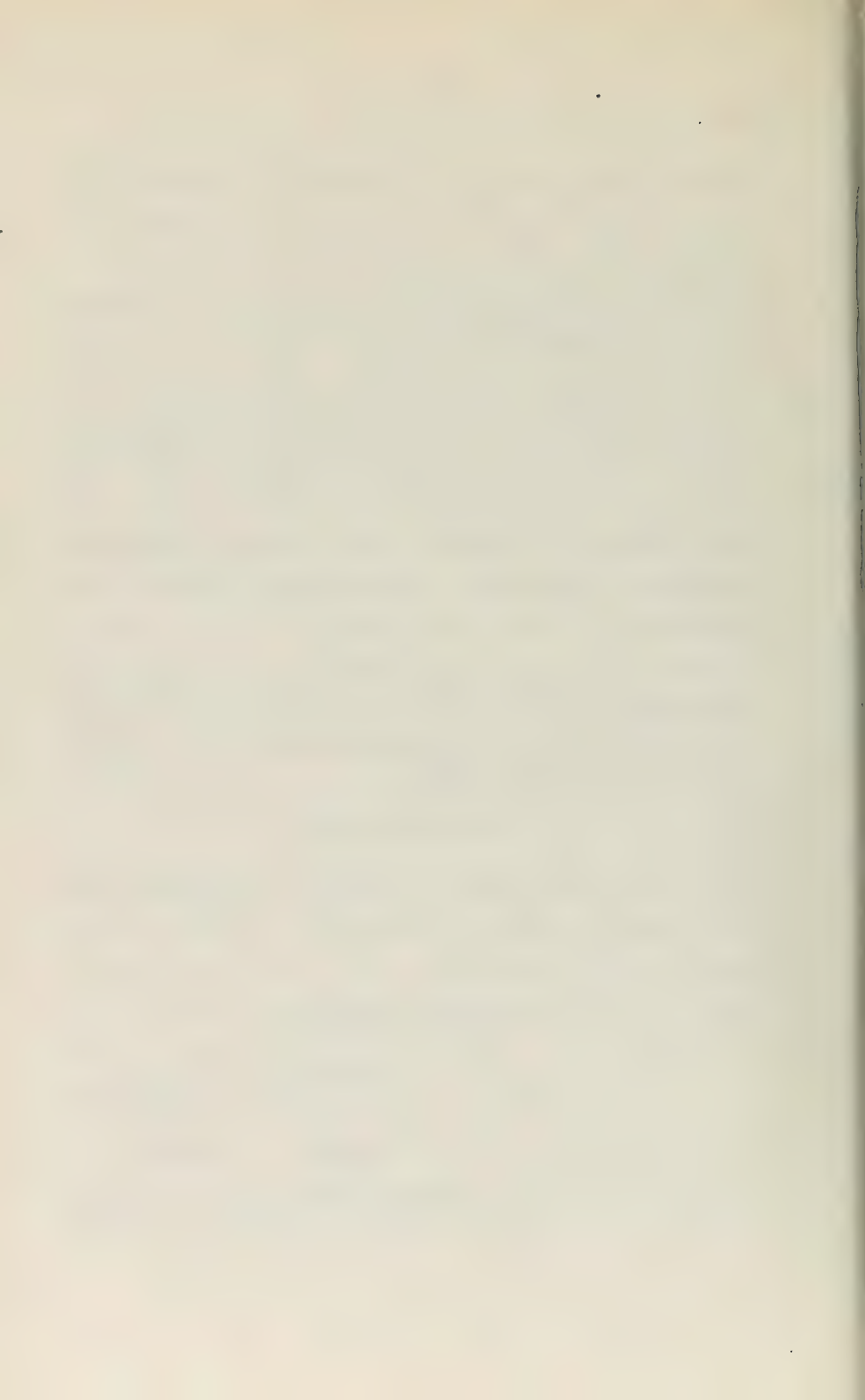
CONCLUSION

For the reasons above stated we respectfully urge this Honorable Court to sustain the verdict and judgment of the Court below.

Respectfully submitted,

SHERMAN DUGGAN,
United States Attorney.

HARRY G. McCAIN,
Assistant United States Attorney,
Third Division, Territory of Alaska.



United States
Circuit Court of Appeals
For the Ninth Circuit.

JOE DUKICH,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Eastern District of Washington,
Northern Division.

FILED
DEC 6 - 1923
F. D. MONTGOMERY,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOE DUKICH,

Plaintiff in Error,

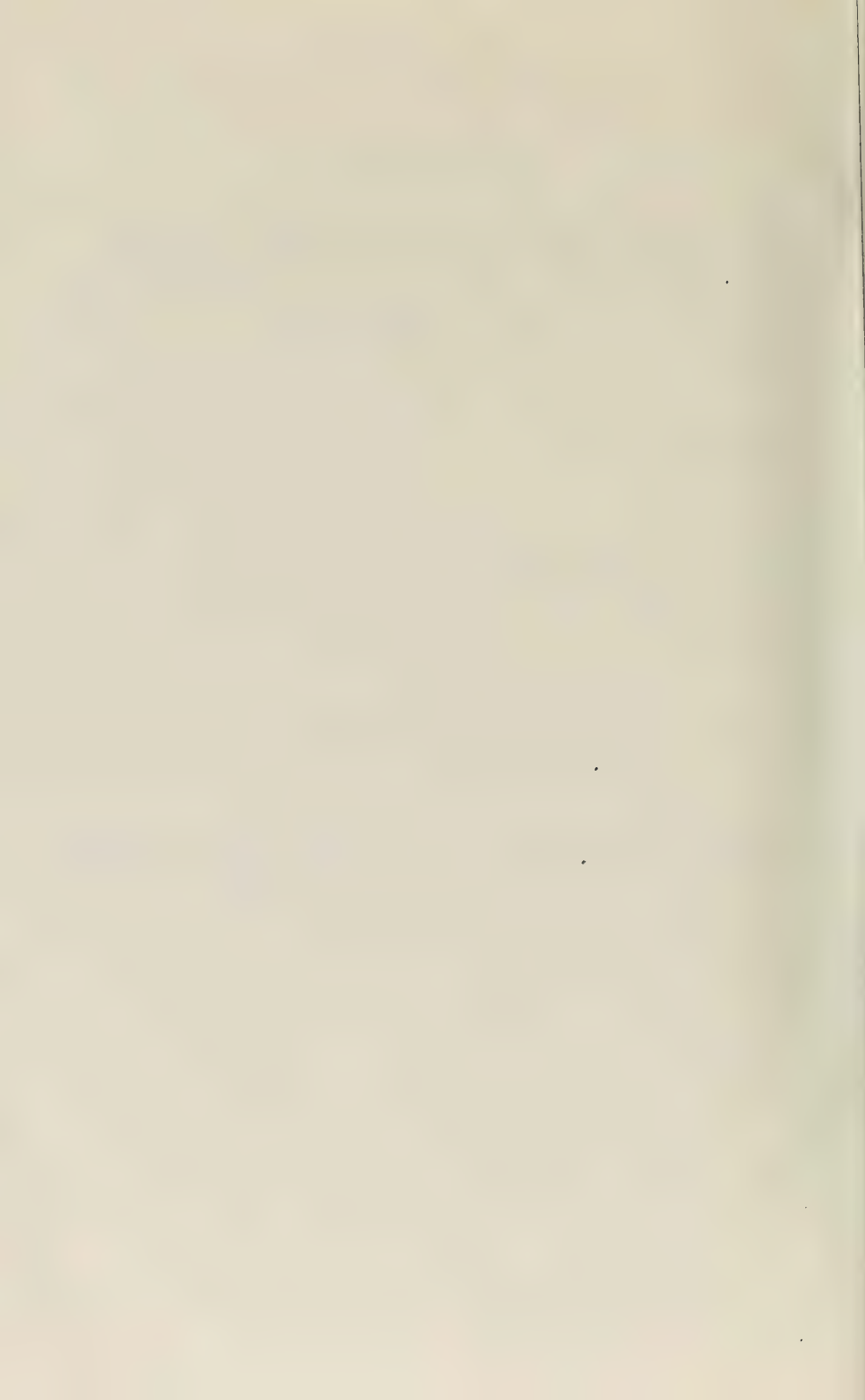
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

F. R. JEFFREY, U. S. Attorney, Spokane, Washington,

H. SYLVESTER GARVIN, Assistant U. S. Attorney, Spokane, Washington,

Attorneys for Plaintiff and Defendant in Error.

E. W. ROBERTSON, Hyde Building, Spokane, Washington,

Attorney for Defendant and Plaintiff in Error. [2*]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DURICH,

Defendant.

Information.

H. SYLVESTER GARVIN, Assistant United States Attorney for the Eastern District of Washington, who for the said United States and in this behalf prosecutes in his own proper person, comes into court on this 6th day of September, in the

*Page-number appearing at foot of page of original certified Transcript of Record.

year 1923, and with leave of the Court first had and obtained and upon his official oath gives the Court here to understand and to be informed as follows:

COUNT I.

That JOE DURICH, whose other or true name is unknown, late of the county of Spokane, State of Washington, heretofore, to wit: on or about the 10th day of July, 1923, in the said county of Spokane, in the Northern Division of the Eastern District of Washington, and within the jurisdiction of this court, did then and there knowingly, wilfully and unlawfully have and possess certain intoxicating liquor, to wit: about one (1) pint of a certain spirituous liquor then and there containing more than one-half of one per centum of alcohol by volume and then and there being fit for beverage purposes, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. [3]

COUNT II.

And the Assistant United States Attorney for the Eastern District of Washington further informs the Court:

That JOE DURICH, whose other or true name is unknown, late of the county of Spokane, State of Washington, heretofore, to wit: on or about the 10th day of July, 1923, in the said county of Spokane, in the Northern Division of the Eastern District of Washington and within the jurisdiction of this court, did then and there wilfully, knowingly and unlawfully sell to one Leonard Regan a cer-

tain quantity of spirituous liquor, the exact amount of which is to the said Assistant United States Attorney unknown, then and there containing more than one-half of one per centum of alcohol per volume, and then and there being fit for beverage purposes, and which said sale by the said Joe Durich, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

H. SYLVESTER GARVIN,
Assistant United States Attorney. [4]

United States of America,
Eastern District of Washington,—ss.

H. Sylvester Garvin, being first duly sworn, upon his oath deposes and says:

That he is the duly appointed, qualified and acting Assistant United States Attorney for the Eastern District of Washington and that he makes this verification as such; that he has read the above and foregoing information, knows the contents thereof and the same is true as he verily believes; probable cause of action established by the United States Commissioner and defendant bound over to the Grand Jury.

H. SYLVESTER GARVIN.

Subscribed and sworn to before me this sixth day of September, A. D. 1923.

ALAN G. PAINE,
Clerk, United States District Court, Eastern District of Washington.

Let process issue.

Dated this 6th day of September, A. D. 1923.

J. STANLEY WEBSTER,

Judge.

Bond fixed at \$——.

Filed in the U. S. District Court, Eastern District of Washington. Sept. 7, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [5]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DURICH,

Defendant.

Demurrer.

Comes now the defendant in the above-entitled action and demurs to the information upon the ground that the same does not state facts sufficient to constitute a crime against the United States.

II.

Defendant demurs to count 1 of the indictment upon the ground that the same does not state facts sufficient to constitute a crime against the United States.

III.

Defendant demurs to count 2 of the indictment upon the ground that the same does not state facts sufficient to constitute a crime against the United States.

E. W. ROBERTSON,
Attorney for Defendant.

H. SYLVESTER GARVIN,
Asst. U. S. Attorney.

10/9/23.

Filed in the U. S. District Court, Eastern District of Washington. October 9, 1923. Alan G. Paine, Clerk. By Eva M. Hardin, Deputy. [6]

In the District Court of the United States for the
Eastern District of Washington, Northern Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DURICH,

Defendant.

Order Overruling Demurrer.

This matter coming regularly on to be heard upon the demurrer of defendant to the information, and the Court having heard the argument of counsel and being fully advised in the premises;

IT IS ORDERED that the said demurrer be and the same hereby is overruled.

The defendant excepts; and an exception is allowed.

Done in open court this 9th day of October, 1923.

J. STANLEY WEBSTER,

Judge.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 15, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [7]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DUKICH,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find the defendant Joe Dukich Guilty as to the First Count;

Guilty as to the Second Count; as charged in the Information.

C. HERBERT MOORE,
Foreman.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 9, 1923. Alan G. Paine, Clerk. By Eva M. Hardin, Deputy. [8]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DUKICH,

Defendant.

Petition for New Trial.

Comes now the defendant and petitions the Court to vacate and set aside the verdict of the jury herein and the judgment of the Court pronounced thereon, and to grant the defendant a new trial upon the following grounds:

I.

Insufficiency of the evidence to justify the verdict and judgment rendered thereon.

II.

Error in law occurring at the trial.

The evidence was insufficient in that it related to purchases of intoxicating liquor from one Mar-

tin and possession by him or other persons and not to any sales of intoxicating liquor or possession of intoxicating liquor by the defendant.

That the errors in law occurring at the trial were as follows:

The denial by the Court of the motion to strike the evidence relating to sales of intoxicating liquor by said Martin.

The information having alleged a sale by the defendant and not by Martin, this was a fatal variance, and the information did not inform defendant of the nature and cause of the accusation against him.

Several sales were shown by Martin and no election made, and there being only one charge of a sale, it was error not to strike such evidence. [9]

The Court further erred in failing to strike the evidence of the possession of a pint of moonshine whiskey by Martin because of a fatal variance between the information and such evidence and because the said information did not inform defendant of the nature and cause of the accusation against him.

The Court erred in denying the motion for a directed verdict of not guilty upon the first count of the information.

The Court erred in denying the motion for directed verdict of not guilty upon the second count of the information.

That the Court erred in instructing the jury as follows:

“ . . . and in this case I instruct you that if you find from the evidence that upon the occasion in question the bartender referred to by the name of Martin was the agent or the employee of the defendant Dukich, and that that man, with the knowledge of Mr. Dukich, had in his possession at that place intoxicating liquor in question, that in law, would amount to the possession of Mr. Dukich.”

That the Court erred in instructing the jury as follows:

“ . . . In this connection I further instruct you that if you find that at the time and upon the occasion in question the defendant had in his employ as his agent the man referred to as the bartender and called Martin, and that the sale of this liquor was made by Martin, and you further find it was made in the presence of the defendant Dukich, and that he aided, abetted, counseled, commanded, induced or procured the bartender known as Martin so to sell the liquor, that, in law, would constitute Mr. Dukich a principal in that transaction and he would be equally guilty with the man Martin who actually carried on and conducted the sale.”

That the Court erred in instructing the jury as follows:

“If you find from the evidence beyond all reasonable doubt that at the time and on the occasion referred to in the evidence as Martin

was the agent or employee of the defendant Dukich, and that upon the time and occasion referred to in the evidence the bartender known as Martin had in his possession intoxicating liquors, that is, liquors suitable for beverage purposes and containing more than one-half of one per centum of alcohol by volume, and that the defendant Dukich knew of the possession of that liquor by his agent or employee, then you should find the defendant guilty of the offense of the possession of intoxicating liquor." [10]

That the Court erred in instructing the jury as follows:

"If you find from the evidence beyond all reasonable doubt that the bartender known as Martin was the agent or employee of the defendant Dukich, and that he sold or delivered to Regan the intoxicating liquor referred to in the evidence, and that at the time of such transaction the defendant Dukich was present and aided, abetted, counseled, advised or participated in the transaction, your verdict should be guilty."

E. W. ROBERTSON,
Attorney for Defendant.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 19, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [11]

In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.

No. C.—4350.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOE DUKICH,
Defendant.

Order Denying Petition for New Trial.

This matter coming regularly on for hearing upon the petition of defendant to set aside the judgment and to grant him a new trial, and the Court having heard the argument of counsel and being fully advised in the premises;

IT IS ORDERED that the said petition be and the same is hereby denied.

Defendant excepts; exception allowed.

Done in open court this 20th day of October, 1923.

J. STANLEY WEBSTER,
Judge.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 20, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [12]

In the District Court of the United States for the
Eastern District of Washington, Northern Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DUKICH,

Defendant.

Motion to Arrest Judgment.

Comes now the defendant in the above-entitled cause and moves the Court to arrest judgment upon the verdict of the jury herein upon the grounds and for the reasons:

I.

That the facts as stated in the information do not constitute a crime or misdemeanor against the United States.

II.

That the facts as stated in count 1 of the information do not state facts sufficient to constitute a crime against the United States.

III.

That the facts as stated in count 2 of the information do not constitute a crime against the United States.

IV.

That count 2 of the information, particularly in view of the evidence introduced in support thereof,

is duplicitous and charges more than one offense, all of which offenses were submitted to the jury under said count.

E. W. ROBERTSON,
Attorney for Defendant.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 15, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [13]

In the District Court of the United States for the
Eastern District of Washington, Northern Division.

No. C.—4350.

UNITED STATES OF AMERICA,
Plaintiff;

vs.

JOE DUKICH,
Defendant.

Order Denying Motion in Arrest of Judgment.

This matter coming regularly on to be heard upon the motion of the defendant in arrest of judgment, it having been stipulated between the said parties that argument on the said motion might be had after rendition of the judgment, and the Court having heard said argument and being fully advised in the premises;

IT IS ORDERED that the said motion be and the same hereby is denied.

Defendant excepts; and an exception is allowed.

Done in open court this 20th day of October, 1923.

J. STANLEY WEBSTER,
Judge.

Filed in the U. S. District Court, Eastern District of Washington. October 20, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [14]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C.—4350.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
JOE DUKICH,
Defendant.

Sentence.

Now, on this 13th day of October, A. D. 1923, into court comes the above-named defendant for sentence, and being informed by the Court of his conviction herein of record, he is asked by the Court if he has any legal cause to show why the judgment of this Court should not now be pronounced in his case, he nothing says, save as he before hath said.

WHEREUPON it is now by the Court CONSIDERED and ADJUDGED upon the verdict of the jury of guilty, that said defendant now before

the Court, is guilty, and it is further ORDERED and ADJUDGED that said defendant be confined in the Spokane County Jail, State of Washington, or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States, for the period of six months from this date, and to pay a fine of five hundred dollars, to stand committed until he is duly discharged by law, and now the said defendant is committed to the custody of the Marshal of the United States for the Eastern District of Washington, who will carry this sentence into execution.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 13, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [15]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DUKICH,

Defendant.

Order Extending Time for Filing Bill of Exceptions.

Upon the application of defendant for an extension of time in which to present, serve and file

his bill of exceptions herein, it appearing that the Court by stipulation of the parties in open Court and within ten days of the rendition of the verdict, had extended such time until the hearing of the petition for a new trial, and plaintiff consenting hereto;

IT IS ORDERED that the time in which defendant may present, serve and file his bill of exceptions be and the same hereby is extended to and including December 7, 1923.

Done in open court this 20th day of October, 1923.

J. STANLEY WEBSTER,

Judge.

O. K.—H. SYLVESTER GARVIN,

Asst. U. S. Attorney.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 20, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [16]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DUKICH,

Defendant.

Petition for Writ of Error.

Comes now Joe Dukich, defendant herein, and says: That on or about the 13th day of October, 1923, this Court entered sentence and judgment against the defendant, Joe Dukich, in which judgment and proceedings had thereunto in this cause certain errors were committed to the prejudice of defendant, all of which will appear more in detail from the assignment of errors, which is filed with this petition.

WHEREFORE, the said Joe Dukich prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals in and for the Ninth Circuit of the United States, for the correction of the errors so complained of, and that the Court fix the bond to operate also as a *supersedeas*, and that a transcript of the record, proceedings and papers in said cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

E. W. ROBERTSON,
Attorney for Defendant.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 20, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [17]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DUKICH,

Defendant.

Order Allowing Writ of Error.

On this 20th day of October, 1923, came the defendant, Joe Dukich, and filed herein and presented to the Court his petition praying for the allowance of a writ of error, and filed therewith his assignments of error, intended to be urged by him, and prayed that the bond to be given to operate also as a *supersedeas* and stay bond, be fixed by the Court, and also that a transcript of the record and proceedings and papers upon which judgment and sentence herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and such other and further proceedings may be had as may be proper in the premises.

In consideration thereof, the Court does allow the writ of error, and the bond for such writ of error and also to operate as a *supersedeas*, is fixed in the sum of \$1,000.00, and upon defendant giving such bond, all proceedings to enforce said sentence and

judgment to be stayed, until such writ of error is determined.

J. STANLEY WEBSTER,
Judge.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 20, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [18]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. C.—4350.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
JOE DUKICH,
Defendant.

Writ of Error.

The President of the United States to the Honorable Judge of the District Court of the United States, for the Eastern District of Washington, Northern Division, GREETING:

Because in the records and proceedings as also in the rendition of judgment and sentence on a plea, which in the said District Court before you, or some of you, between Joe Dukich, plaintiff in error (defendant in the lower court), and the United States of America, defendant in error (plaintiff in the lower court), manifest error hath happened, to the

great damage of the said Joe Dukich, plaintiff in error as by his complaint appears:

We being willing that error, if any hath happened, shall be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf duly command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date of this writ in the said Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid, being inspected, this said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done. [19]

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 20th day of October, 1923, in the year of our Lord one thousand nine hundred twenty-three.

ALAN G. PAINE,

Clerk of the United States District Court, for the
Eastern District of Washington, Northern
Division.

Allowed by:

J. STANLEY WEBSTER,
District Judge.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 20, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [20]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DUKICH,

Defendant.

Assignment of Errors.

Comes now the above-named defendant and herein files his assignment of errors committed by the trial judge in the proceedings and trial of the above-entitled cause, to wit:

I.

That the Court erred in overruling the demurrer to the information.

II.

That the Court erred in overruling the demurrer to the first count of the information.

III.

That the Court erred in overruling the demurrer to the second count of the information.

IV.

That the Court erred in refusing to strike the evidence relating to the sales of intoxicating liquor

by one Martin for the reason that the information charged a sale by the defendant and did not name or otherwise refer to the said Martin, and such evidence constituted a fatal variance from the information, and the information did not apprise defendant of the nature and cause of the accusation against him. [21]

V.

That the Court erred in denying the motion to strike the evidence relating to the possession of a pint of moonshine whiskey by the said Martin, or others, for the reason that the information charged possession by the defendant and did not refer to the said Martin or others, and that this evidence constituted a fatal variance from the information, and the information did not inform defendant of the nature and cause of the accusation against him.

VI.

That the Court erred in denying the motion of the defendant for a directed verdict of not guilty as to the first count of the information.

VII.

That the Court erred in denying the motion of the defendant for a directed verdict of not guilty as to the second count of the information.

VIII.

That the Court erred in instructing the jury as follows:

“ . . . and in this case I instruct you that if you find from the evidence that upon the occasion in question the bartender referred to by the name of Martin was the agent or the

employee of the defendant Dukich, and that that man, with the knowledge of Mr. Dukich, had in his possession at that place the intoxicating liquor in question, that, in law, would amount to the possession of Mr. Dukich."

IX.

That the Court erred in instructing the jury as follows:

" In this connection I further instruct you that if you find that at the time and upon the occasion in question the defendant had in his employ as his agent the man referred to as the bartender and called Martin, and that the sale of this liquor was made by Martin, and you further find it was made in the presence of the defendant Dukich, and that he aided, abetted, counseled, commanded, induced or procured the bartender known as Martin so to sell the liquor, that, in law, would constitute Mr. Dukich a principal in that transaction and he would be equally guilty with the man Martin who actually carried on and conducted the sale." [22]

X.

That the Court erred in instructing the jury as follows:

"If you find from the evidence beyond all reasonable doubt that at the time and on the occasion the man referred to in the evidence as Martin was the agent or employee of the defendant Dukich, and that upon the time and occasion referred to in the evidence the bar-

tender known as Martin had in his possession intoxicating liquors, that is, liquors suitable for beverage purposes and containing more than one-half of one per centum of alcohol by volume, and that the defendant Dukich knew of the possession of that liquor by his agent or employee, then you should find the defendant guilty of the offense of the possession of intoxicating liquor.”

XI.

That the Court erred in instructing the jury as follows:

“If you find from the evidence beyond all reasonable doubt that the bartender known as Martin was the agent or employee of the defendant Dukich, and that he sold or delivered to Regan the intoxicating liquor referred to in the evidence, and that at the time of such transaction the defendant Dukich was present and aided, abetted, counseled, advised or participated in the transaction, your verdict should be guilty.”

XII.

That the Court erred in denying the motion of defendant in arrest of judgment for the reasons set forth in said motion in arrest of judgment, to which reference is herein made.

XIII.

That the Court erred in denying defendant's petition to set aside the verdict and vacate the judgment

upon the grounds and reasons stated in the said petition, to which reference is hereby made.

E. W. ROBERTSON,
Attorney for Defendant.

Filed in the U. S. District Court, Eastern District of Washington. October 20, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [23]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DUKICH,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That we, Joe Dukich, as principal, and the American Surety Company of New York, as sureties, are held and firmly bound unto the United States of America, in the full and just sum of \$1000.00 to be paid to the United States of America, to which payment well and truly to be paid, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 20th day of October, in the year of our Lord one thousand nine hundred twenty-three.

Whereas, lately at the September term, A. D. 1923, of the District Court of the United States, for the Eastern District of Washington, Northern Division, in a suit pending in said court, between the United States of America, plaintiff, and Joe Dukich, defendant, a judgment and sentence was rendered against the said Joe Dukich, and the said Joe Dukich has obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America, to be and appear in the United States Circuit Court of Appeals, for the Ninth Circuit at the City of San Francisco, State of California, 30 days from and after the date of said citation, which citation has been duly served.

[24]

Now, the condition of the above obligation is such that if the said Joe Dukich shall appear, either in person or by attorney, in the United States Circuit Court of Appeals, for the Ninth Circuit, on such day or days as may be appointed for the hearing of said cause, in said court, and prosecutes his said writ of error, and abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in the execution of the judgment and sentence appealed from, as said Court may direct, if the judgment and sentence against him shall be affirmed, or the writ of error or appeal is dismissed; and if he shall appear for trial in the District Court

of the United States, for the Eastern District of Washington, Northern Division, on such day or days as may be appointed for a retrial, by said District Court, and abide by and obey all orders made by said Court, provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

JOE DUKICH,
Principal.

AMERICAN SURETY COMPANY OF
NEW YORK.

By W. L. BERRY,
Res. Vice-President.

Attest: E. F. KIDD,
Resident Assistant Secretary.

Bond approved this 20th day of Oct., 1923.

J. STANLEY WEBSTER,
Judge.

Approved as to form:

H. SYLVESTER GARVIN,
Asst. U. S. Atty.

Filed in the U. S. District Court, Eastern District of Washington. October 20, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [25]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DURICH,

Defendant.

**Stipulation Re Transmission of Original Bill of
Exceptions.**

IT IS HEREBY STIPULATED AND
AGREED by and between the respective parties
hereto, through their respective attorneys, that the
clerk of the above-named court may forward to the
Circuit Court of Appeals of the Ninth Circuit the
original bill of exceptions, now on file with said
clerk.

Dated at Spokane, Washington, this 13th day of
November, 1923.

H. SYLVESTER GARVIN,

Attorney for Plaintiff, Asst. U. S. Attorney.

E. W. ROBERTSON,

Attorney for Defendant.

Filed in the U. S. District Court, Eastern District
of Washington, Nov. 13, 1923. Alan G. Paine,
Clerk. By Eva M. Hardin, Deputy. [26]

In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DUKICH,

Defendant.

Citation on Writ of Error.

The President of the United States, to the United
States of America, and the Messrs. F. R. JEF-
FREY and H. SYLVESTER GARVIN, Your
Attorneys, GREETING:

You are hereby cited and admonished to be and
appear at the United States Circuit Court of Ap-
peals for the Ninth Circuit, to be held at the city
of San Francisco, in the State of California, within
thirty days from the date of this writ, pursuant to
a writ of error, regularly issued, and which is on file
in the office of the clerk of the District Court of the
United States, for the Eastern District of Wash-
ington, Northern Division, in an action pending in
said court, wherein Joe Dukich is plaintiff in error
(defendant in the lower court), and the United
States of America, is defendant in error (plaintiff
in the lower court), and to show cause, if any there
be, why the judgment in said writ of error men-

tioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States of America, this 20 day of October, 1923.

J. STANLEY WEBSTER,
United States District Judge.

Due and legal notice of above citation acknowledged and copy thereof received this 20 day of October, 1923.

F. R. JEFFREY,
U. S. District Attorney.

Filed in the U. S. District Court, Eastern District of Washington. October 20, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [27]

In the District Court of the United States for the
Eastern District of Washington, Northern Division.

No. C.—4350.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOE DUKICH,
Defendant.

Praeipie for Transcript of Record.

To the Clerk of the Above-entitled Court:

Please make up and certify to the Circuit Court

of Appeals, Ninth Judicial Circuit, the following papers and records in the above-entitled cause.

1. Information.
2. Demurrer to the information.
3. Order overruling demurrer to information.
4. Verdict of the jury.
5. Motion for new trial.
6. Order overruling motion for new trial.
7. Motion in arrest of judgment.
8. Order overruling motion in arrest of judgment.
9. Judgment and sentence of the Court.
10. Order extending time for filing bill of exceptions.
11. Petition for writ of error.
12. Order allowing writ of error and fixing bond.
13. Writ of error.
14. Assignments of error.
15. Bond and approval thereof.
16. Stipulation re transmission of original bill of exceptions.
17. Citation.
18. Praecept for transcript of record.

E. W. ROBERTSON,
Attorney for Defendant.

Filed in the U. S. District Court, Eastern District of Washington. Nov. 13, 1923. Alan G. Paine, Clerk. By Eva M. Hardin, Deputy. [28]

In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DUKICH,

Defendant.

**Certificate of Clerk U. S. District Court to Tran-
script of Record.**

United States of America,
Eastern District of Washington,—ss.

I, Alan G. Paine, Clerk of the District Court of the United States for the Eastern District of Washington, Northern Division, do hereby certify that the foregoing pages constitute and are a true, complete and correct copy of the record, pleadings, testimony and all proceedings had in said action, as called for in defendant's praecipe for transcript, and as the same remain on file and of record in said District Court, and that the same which I transmit constitute my return to the annexed Writ of Error lodged and filed in my office on the 20th day of October, 1923. I also annex and transmit the original citation in said action.

I further certify that the cost of preparing and certifying to said record amounts to the sum of Nine and 50/100 (\$9.50) Dollars, and that the same

has been paid in full by the defendant, and plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at the city of Spokane, in said Eastern District of Washington, Northern Division, in the [29] Ninth Judicial Circuit, this 15th day of November, 1923, A. D., and the Independence of the United States of America, the one hundred and forty-eighth.

[Seal] Attest: ALAN G. PAINE,
Clerk of the United States District Court for the
Eastern District of Washington. [30]

In the District Court of the United States in and
for the Eastern District of Washington, North-
ern Division.

No. C.—4350.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DUKICH,

Defendant.

Notice.

To the Above-named Plaintiff and to Messrs. F. R. Jeffrey and H. Sylvester Garvin, Your Attorneys:

You, and each of you, are hereby notified that the above-named defendant has prepared and filed with the clerk of the above-entitled court a pro-

posed bill of exceptions, a copy of which is herewith served upon you.

You are further notified that said defendant will, at the time said bill of exceptions is certified, ask the Court to order attached and made a part of said bill of exceptions all of the exhibits received or offered in evidence on the trial, which are not already a part hereof.

Dated at Spokane, Washington, this 13th day of November, 1923.

E. W. ROBERTSON,
Attorney for Defendant.

Service of the above and foregoing notice and of the bill of exceptions attached thereto, by true copy thereof, is hereby acknowledged this 13th day of November, 1923.

H. SYLVESTER GARVIN,
Asst. U. S. District Attorney. [31]

In the District Court of the United States for the
Eastern District of Washington, Northern Division.

No. —.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE DUKICH,

Defendant.

Bill of Exceptions.

Before the Honorable J. STANLEY WEBSTER,
District Judge.

APPEARANCES:

For the Plaintiff: H. SYLVESTER GARVIN,
Asst. U. S. District Attorney.

For the Defendant: E. W. ROBERTSON.

BE IT REMEMBERED, that the above-entitled cause came on regularly for hearing in the above-entitled court on Tuesday, October 9, 1923, at 2:00 o'clock, P. M., before the Hon. J. Stanley Webster, District Judge, the plaintiff appearing by H. Sylvester Garvin, Assistant United States District Attorney, and the defendant appearing in person and by his attorney, E. W. Robertson, thereupon the following proceedings were had and done, to wit:

THEREUPON a jury was duly empaneled and sworn to try the cause.

OPENING STATEMENT.

Mr. GARVIN.—If the Court please, and Gentlemen of the jury: The Government will show in this case that on the day in question Prohibition Agents Edholm and Regan went down to the bar that was conducted at that time by the defendant in this case; the bar was known as the Marga Bar, at 45 Main Avenue, here in the city of Spokane. That on a previous occasion to the day in question, we will establish, or attempt to establish in the proof, that the agents went into that place and met the de-

fendant, who was the owner and proprietor of it; that he, in turn, introduced them to the man who was the bartender behind the bar and upon various occasions intoxicating liquors were sold, and upon that we will expect a verdict of guilty at your hands. [32]

Testimony of Leonard Regan, for the Government.

LEONARD REGAN, called as a witness by the United States, being first duly sworn, testified in its behalf as follows:

Direct Examination.

(By Mr. GARVIN.)

I am a federal prohibition agent with headquarters at Seattle, and became acquainted with the defendant first meeting him in July, 1923, at his place of business at 45 West Main Street, Spokane. His place is a soft-drink resort. Agent Edholm was with me, and it was about 10:00 P. M. on the 9th. The defendant was standing outside. Agent Edholm and myself were accompanied by another man who we picked up on Main Street in that vicinity. This man spoke to defendant, who followed us in and "sort of nodded to a bartender" who served us three drinks.

Mr. ROBERTSON.—If the Court please, I object to that upon the ground it is a variance from the allegation in the indictment. I want to preserve my objections here and make them timely, without taking up the time of the Court. The allegation of another sale by another party other than this defendant not being charged in this indictment,

(Testimony of Leonard Regan.)

and not being set forth, can not be proved as against this defendant. He is entitled to be informed as to the nature of the accusation and the relations between the parties that may be claimed acted in this matter. I hope, without repeating my objection, your Honor will have it in mind.

The COURT.—I will overrule it for the present. It can be renewed at the conclusion of the whole case.

Mr. ROBERTSON.—Exception.

The WITNESS.—We spoke to the defendant, called him “Joe” and walked in. He looked us over and we said we want a drink. I said that. He nodded to the bartender. He went to the further end of the bar and behind the cigar-case. The bartender served us three drinks for which I paid seventy cents, and the bartender rang it up in the till. I wish to correct that, I paid one dollar. It was moonshine whiskey fit for beverage purposes and contained more than one-half of [33] one per cent of alcohol.

We then left and Agent Edholm and I came back alone on the 10th of July. We spoke to defendant, saying, “How do you do, Joe?” He was behind the cigar-case and there was a different bartender than the night previous behind the bar. I asked the bartender for a drink of moonshine whiskey and he served us two drinks of moonshine. I paid seventy cents. It was rung up in the cash register.

At 10:00 P. M. Agent Edholm and myself returned and purchased a drink of moonshine whiskey

(Testimony of Leonard Regan.)

from the bartender. I paid for the first drink, seventy cents, and asked the bartender, a man by the name of Martin, for a pint of liquor. He sent a man to get it to the rear of the establishment. The defendant was present behind the bar. When the man was gone after the pint bottle of liquor, Agent Edholm bought a drink of moonshine whiskey. The man came back, handed the bottle to Martin and I gave Martin a five dollar bill and he rang two dollars and a half in the cash register and returned me two and a half in change and gave me the bottle.

I can identify this as the bottle I secured on that occasion.

Mr. GARVIN.—I offer this.

Mr. ROBERTSON.—If the Court please, I object to the introduction of this liquor in evidence upon the ground that there is no allegation of agency or association or anything of that kind or character in this case, and the proof shows, if anything, a purported agency or something of that kind or character of which the defendant had no notice in this charge. I move to strike, further, all of the evidence with relation to sales of moonshine whiskey, upon the ground that the testimony of this witness now discloses if any sales were made to him, they were made by a person other than this defendant, and there is no charge in this information which would have informed this defendant of the nature and character of the allegation against him, and it is a variance from the allegation made

in the information that the sales were made by the defendant to this witness. [34]

Mr. GARVIN.—If the Court please, while in one sense some of the statements of counsel are true, the facts have established this from the testimony of the witness: that the defendant was in charge of the place at the time; that the other man was a bartender; that it is a soft-drink parlor, a public place in the city of Spokane; first of all there was a conversation with reference to the purchase of intoxicating liquor, which was served; the money which was given in payment for the intoxicating liquor served was rung up in the cash register; that all of these transactions were in the presence of the defendant, in his place of business, the place over which he has control and management. I will say this in fairness, I expect to go further, not by this witness, as to who was the then proprietor of the place on that particular date.

The COURT.—I will deny the motion for the present. Counsel can renew it, if he cares to, at the conclusion of the case.

Mr. GARVIN.—And my motion will be granted for an identification of this?

The COURT.—Yes.

Mr. ROBERTSON.—Your Honor will grant me an exception at this time?

The COURT.—Yes.

(Thereupon the said bottle was handed to the clerk and marked Plaintiff's Exhibit No. 1 for identification.)

(Testimony of Leonard Regan.)

There was nothing further done on this occasion, the night of the 10th.

Cross-examination.

(By Mr. ROBERTSON.)

I first met Mr. Dukovitch on the 9th day of July, 1923, I was introduced to him. The other man said, "Hello, Joe," and we said, "Hello, Joe." I met this other man on Main Street, within a block or two of this resort. I met him in the investigation we were making, part of the investigation, and asked him if he knew where we could get a drink, and he said he did. This was on the street. I spoke to him first. He was down in that part of the town and he looked favorable, that is, as if he knew where we could get a drink. I could not tell you how [35] that is. I do not know what his name is, I did not want to know his name because he was only serving a purpose for me. I did not hear his name called by the defendant when he said "Hello, Joe," to him. I did not hear his name called by Martin. I did not do anything to keep from hearing his name.

Mr. Dukich was on the outside of the place and this was the first time I had ever met him. I had seen him a number of times before that on my visits to Spokane on different investigations. I remember no particular time. I cannot recall how many times I saw him, he is a man very easily to be remembered. I had seen him two or three times at other places and had seen him twice when going by his place of business. I cannot remember

(Testimony of Leonard Regan.)

how many times I have seen him, he is a man very easily recognized. I have never seen him at any other place except on Main Street or standing in front of his place. This was in Spokane about six months ago.

Q. Now, I will ask you, Mr. Regan, if on the 10th day of February, 1922, at about eight o'clock P. M., you were in the Marga Bar, on the corner of Main and Brown Avenue—and Brown Street?

A. I believe I did have a case against that at that time. I would have to go back to my records to refresh my recollection. I have handled a good many hundred cases since then.

Q. I will ask you if on that occasion you saw Joe Dukich?

A. I can not recall at that time now.

Q. I will ask you, Mr. Regan, if on the 24th day of April, 1922, you testified as a witness in this courtroom, in the case of a man by the name of Stanley Jukich?

A. I did. I believe I did, as near as I can remember. I have testified in so many cases I cannot remember the names without going back to my notes.

Q. I will ask you if this man Joe Dukich was not a witness on that trial, and sat up in that chair and testified in your presence for some time?

A. I do not remember the case of Stanley Jukich and do not remember [36] Joe Dukich testifying as a witness in that case or remember seeing him. I do not remember seeing Stanley Jukich and Joe Dukich and having a conversation with them after

(Testimony of Leonard Regan.)

that case in the hall outside the courtroom. When we first went in the bar on the 9th, the first thing that was said was when I asked for a drink after we had exchanged greetings. The greetings were, as we said, "Hello, Joe." The man who was with us did not say anything to Joe about where he met me. We said "Hello, Joe," we went to the bar. Joe was not the bartender. Joe preceded us and went around the cigar counter. We went to the bar. We did not ask the defendant, who was behind the cigar counter, for a drink.

Q. The first thing you said then that you wanted a drink was addressed to the bartender?

A. Yes, sir.

The bartender at that time was behind the bar, I don't recall which part of it, and the defendant was behind the cigar counter and did not go to the place where the bartender was. There were two or three men in the room. Men were coming in and going out. We were there just a few minutes.

Q. Now, when you asked for this drink, Mr. Regan, who was the one who made the request?

A. I did.

Q. You spoke in a loud tone of voice?

A. No, sir.

Q. In a low tone of voice? A. Yes, sir.

Q. And so that only the bartender and you who were there in the immediate circle could hear it, I assume?

A. I spoke in an ordinary tone of voice.

Q. Didn't you just answer that you spoke in a low tone of voice?

(Testimony of Leonard Regan.)

A. Well, I didn't. You asked me if I spoke in a loud tone of voice. I spoke in an ordinary conversation, I did not holler. [37]

I paid the money for the drink to the bartender Martin.

Agent Edholm and I went back there again on the 10th at about five P. M. There was a strange man behind the bar. We went up to the bar and asked for a drink of moonshine. The bartender served us. The defendant was standing at the cigar counter talking to somebody who looked to be foreigners. My request for the drink was made to the bartender who served us without any further ado, after we had exchanged greetings with Mr. Dukovitch, our greetings being simply, "Hello, Joe."

We came back about 10:30 that night, said "Hello, Joe," and he answered "Hello." He was behind the cigar counter surrounded by a group of countrymen conversing. I did not interrupt the conversation or gathering. I went down further on to where the bartender was, asked him for a drink and he served us with one. I paid for the first drink. Agent Edholm paid for the second. After I purchased a drink, I asked the bartender for a bottle. He spoke to a man in front of the bar in some foreign language and the man proceeded to the rear of the room, went into some room or closet and while he was gone, Agent Edholm said, "Let's have another drink," and the bartender served us. Agent Edholm paid. The man returned with the bottle, gave it to the bartender, the bar-

(Testimony of Leonard Regan.)

tender passed it over to me, I gave him five dollars and he rang up two dollars and a half and returned the change. During this time the defendant was at the cigar counter. Two or three men were talking to him. I had no conversation with him that night other than to say, "Good-night," to him. I do not know where the man went who went to the rear of the room other than that he opened a door. I do not know where he went after opening it.

Redirect Examination.

(By Mr. GARVIN.)

Q. Mr. Regan, for the purpose of refreshing your recollection, do you recall the case of the United States vs. Stanley Dukich, in which you and Mr. H. J. Stetson, who was a prohibition agent at that time under Mr. Roy Lyle, before you got into the service as a general [38] agent, testified?

A. I believe I do.

Q. In order to refresh your memory, do you remember you originally testified on the case here and had to leave for Seattle and you took Mr. Stetson down there with you? A. Yes, sir.

Q. Do you now recall the case which Mr. Robertson referred to. A. I do recall the case now.

Q. Did you have any distinct recollection of this man from that incident or not?

A. I did not, because he was not the defendant. He was a witness. I do not remember the witnesses. I would remember the other man, Stanley.

(Testimony of Leonard Regan.)

Recross-examination.

(By Mr. ROBERTSON.)

When I went to the Marga Bar on the 9th of July I had entirely forgotten that I had been in that place before and arrested Stanley Jukich. I had forgotten the place and everything else at that time.

Redirect Examination.

My ordinary duties as an agent, in addition to investigations, are not confined to any one particular place, I have four states and Alaska and am traveling from place to place, and since the early spring of 1922, I have handled possibly one hundred and fifty to two hundred cases.

Testimony of Oscar V. Edholm, for the Government.

OSCAR V. EDHOLM, called as a witness by the United States, being first duly sworn, testified in its behalf as follows:

Direct Examination.

(By Mr. GARVIN.)

I am a general prohibition agent with headquarters at Seattle. I met the defendant in July, 1923, at the Marga Bar, at 45 Main [39] Avenue about nine o'clock in the evening, with Agent Regan and another gentleman whose name I do not know, whom we met somewhere down the street. After I arrived at this place we went in and Mr. Regan bought a drink of moonshine whiskey. The defendant was back of the cigar counter at that time.

(Testimony of Oscar V. Edholm.)

Q. Did you have any conversation, or did Mr. Regan or this other gentleman have any conversation with him with reference to the purchase of any liquor?

* * * * *

Q. The drinks were ordered from the bartender.

Mr. GARVIN.—Q. I know, but I am asking you now, Mr. Edholm, please pay attention to my questions. You are not excited are you, now?

A. I do not think so.

Q. * * * Did you have any conversation with the defendant with reference to liquor, or did Mr. Regan, that you heard?

A. I did not have any direct. When we met Mr. Dukich we said we came up for a drink.

Q. All right, then what?

A. We went to the bar and we were served.

We came back the second day, about the 10th of July, about five oclock in the afternoon, Agent Regan and I, and bought a round of drinks from a different bartender than was there before. We spoke to the defendant, he was behind the cigar counter. We came back later at ten o'clock and there was a bartender by the name of Martin. We bought a round of drinks of moonshine whiskey. Defendant was back of the cigar-case, towards the front of the bar. The cigar-case runs right up to the edge of the bar. He was behind it and the bartender was down the bar where the drinks were served.

Q. Then what took place?

(Testimony of Oscar V. Edholm.)

A. Mr. Regan asked the bartender for a pint of whiskey. The bartender spoke to a man who disappeared through the rear of the [40] hall and came back in about a minute with a bottle of moonshine whiskey, which was delivered to Mr. Regan, who paid for it. The defendant at that time was somewhere in the front of the bar, leaning against the back end of the case.

Cross-examination.

(By Mr. ROBERTSON.)

I don't recall where we met the man that we went to the bar with, nor what his name was, nor do I recall hearing him addressed by name.

When we went in the defendant was in front of the bar and went in and took a position in back of the cigar counter. There was nothing further passed between us and the defendant and this other man except greetings before we went up to the bartender to ask for a drink, that I can recall, and when we went up to the bartender, the defendant was behind the cigar counter and the bartender was behind the place at the bar where the drinks were being served. He was about the middle of the bar, he might have been a little ways towards either end. My estimate is that the bar is about twenty feet and the cigar counter about seven or ten feet, and that the defendant was about the center of the cigar counter.

On our third visit there, the defendant was back of the cigar counter. The bartender served us a drink of moonshine. This was the evening of July

(Testimony of Quintard Johnson.)

10th and is the time when the man went out for the bottle. I do not know where he went to, he went out the back way.

Testimony of Quintard Johnson, for the Government.

QUINTARD JOHNSON, called as a witness by the United States, being first duly sworn, testified in its behalf as follows:

Direct Examination.

(By Mr. GARVIN.)

I am the City Chemist for the city of Spokane and made an examination of Plaintiff's Exhibit No. 1 and it contains fifty per cent alcohol and is fit for beverage purposes and is commonly [41] known as moonshine whiskey.

Testimony of Warren E. Beltz, for the Government.

WARREN E. BELTS, called as a witness by the United States, being first duly sworn, testified in its behalf as follows:

Direct Examination.

(By Mr. GARVIN.)

I am a General Prohibition Agent with headquarters at Seattle. Plaintiff's Exhibit No. 1 was in my possession in the sheriff's vault and I brought it over to this building, to this trial.

Mr. GARVIN.—I move for the admission of Plaintiff's Exhibit No. 1 for Identification.

Mr. ROBERTSON.—I have my objection to that as stated before to the Court.

(Testimony of D. E. Dunning.)

The COURT.—The objection will be overruled. It will be admitted.

Mr. ROBERTSON.—Exception.

(Thereupon the bottle heretofore marked for identification was received in evidence as Plaintiff's Exhibit 1 admitted, and is made a part hereof.)

Testimony of D. E. Dunning, for the Government.

D. E. DUNNING, called as a witness by the United States, being first duly sworn, testified in its behalf as follows:

Direct Examination.

(By Mr. GARVIN.)

I am secretary to the Commissioner of Public Safety and City License Inspector, and make investigations of different places such as soft drink parlors, granting licenses, and I am familiar with 45 West Main Avenue, known as the Marga Bar. The proprietor is Joe Dukich, and was proprietor in the month of July, 1923, and secured a license.

Mr. GARVIN.—The Government will rest.

Mr. ROBERTSON.—I move to strike from the consideration of the jury all of the testimony of the witnesses in the case relating to the purchase of drinks of alleged intoxicating liquor in the Marga Bar. [42]

(2) I move to strike and withdraw from the consideration of the jury all of the evidence relating to the purchase of the bottle of alleged moonshine liquor from the bartender at the Marga Bar.

(3) I move the Court to instruct the jury to return a verdict of not guilty upon the count one of the indictment, on the ground that the evidence legally competent as against this defendant is not sufficient to go to the jury upon the question of his guilt or the possession of a pint of intoxicating liquor.

(4) I move the Court to instruct the jury to return a verdict of not guilty as to the second count of the indictment, upon the ground that the evidence is insufficient to justify submitting it to the jury upon the question of the defendant's guilt as to that count of the indictment.

(5) I move, further, to strike all of the evidence in the case relating to the purchase of intoxicating liquors upon the ground that there is a variance between the allegations of the information and the proof;

Upon the further ground, that the information is totally insufficient and inadequate to notify the defendant of the particular charge against him, failing to state or allege that the sale of intoxicating liquors was made by a person other than the defendant, and failing to allege any connection between the defendant and the person who is now claimed to have made the sales.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 4149.

JOE DUKICH,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

**Stipulation Re Denial of Motions to Strike and
Withdraw Evidence from Jury, etc.**

IT IS HEREBY STIPULATED AND
AGREED by and between the respective parties
hereto that the printed record may be amended to
show that the motions made on pages 49 and 50
thereof were each and all denied by the Court, and
that an exception to the denial of each of said mo-
tions was taken by defendant's counsel.

E. W. ROBERTSON,

Attorney for Plaintiff in Error.

H. SYLVESTER GARWIN,

Attorney for Defendant in Error,

Assistant United States Attorney.

[Endorsed]: No. 4149. United States Circuit Court of Appeals for the Ninth Circuit. Joe Dukich, Plaintiff in Error, vs. The United States of America, Defendant in Error. Stipulation Re Denial of Motions to Strike and Withdraw Evidence from Jury, etc. Filed Jan. 3, 1924. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

Testimony of Joe Dukich, on His Own Behalf.

JOE DUKICH, being called as a witness and being first duly sworn, testified in his own behalf as follows:

Direct Examination.

That he knew the witness Leonard Regan and knew that he was a Government Prohibition Agent, having testified as a witness for the defense in a case in which said Regan had been a witness for the Government, and having seen and heard the said Regan testify in that case. [43]

That the witness Regan and Edholm were not in his place of business in July, 1923, when he was present; that if they had been he would have recognized Regan. That no intoxicating liquors were sold to them by a bartender or anyone else in his presence and that he did not authorize any bartender either to keep or sell intoxicating liquors.

(Argument by Mr. Garvin.)

(Argument by Mr. Robertson.)

(Reply by Mr. Garvin.)

Charge to Jury.

The COURT.—Gentlemen of the Jury, it now becomes the duty of the Court to explain to you the issues in this case and to instruct you upon the rules of law by which you are to be guided in your deliberations, and it is your duty to accept these instructions as correct and so far as the law of the case is concerned to be guided by them.

The information in this case accuses the defendant, Joe Dukich, first, with the offense of the unlawful possession of intoxicating liquor, and in count two with the unlawful sale of intoxicating liquor to one Leonard Regan, the act of possession alleged to have been on the 10th day of July, 1923, and the act of sale to have been on the same day.

In this connection, Gentlemen of the Jury, I instruct you that by possession as used in count one of this information is meant the physical custody of the thing in question, coupled with the authority of dominion and control over it, and in this case I instruct you that if you find from the evidence that upon the occasion in question the bartender referred to by the name of Martin was the agent or the employee of the defendant Dukich, and that that man, with the knowledge of Mr. Dukich, had in his possession at that place the intoxicating liquor in question, that, in law, would amount to the possession of Mr. Dukich. [44]

Intoxicating liquor, as I have many times instructed this jury, is liquor suitable for beverage purposes, and which contains more than one-half of one per centum of alcohol by volume.

In the second count of this information the crime alleged is that of unlawful sale of intoxicating liquor, and by sale is meant transfer of title to property from one person to another for a consideration. In this connection I further instruct you that if you find that at the time and upon the occasion in question the defendant had in his employ as his agent the man referred to as the bartender

and called Martin, and that the sale of this liquor was made by Martin, and you further find it was made in the presence of the defendant Dukich, and that he aided, abetted, counseled, commanded, induced or procured the bartender known as Martin so to sell the liquor, that, in law, would constitute Mr. Dukich a principal in that transaction and he would be equally guilty with the man Martin who actually carried on and conducted the sale. Please bear in mind that in order to constitute the guilt of the defendant arising out of the sale by Martin it is necessary for you to find that Mr. Dukich was actually present and that he aided and counseled and assisted or concurred, or advised or participated in the transaction committed by the man Martin, and you must further find that the liquor was in fact sold, and you must find that the liquor sold was intoxicating liquor, that is, that it contained more than one-half of one per centum of alcohol by volume. If you find from the evidence that at the time the sale was made the defendant Dukich was not present, then your verdict should be not guilty, and even though you find that the defendant was physically present at the time, if you further find that he did not aid, counsel, abet, encourage, assist, advise or participate in the transaction, you will find the defendant not guilty.

To these charges in this information the defendant has interposed a plea of not guilty, and the effect of that plea is to cast upon the Government the burden of establishing each and every of the

essential elements of this crime to your satisfaction and [45] beyond all reasonable doubt.

The defendant is presumed to be innocent of the crime with which he is charged, and that presumption is one of his important and substantial rights. It is guaranteed to him by the laws of the land. It attaches to him and continues with him throughout all stages of the trial and throughout all stages of your deliberations as jurors until it has been met and overcome by the evidence in the case and his guilt has been established to your satisfaction beyond all reasonable doubt, notwithstanding the presumption of innocence with which the law surrounds him.

By reasonable doubt as used in these instructions is meant a doubt which is based upon reason. It is defined to be such a doubt as, if entertained by a person of ordinary prudence, sensibility and decision in transacting the graver and more important affairs of life, would cause him to hesitate or waiver before acting. It must be a real and substantial doubt and must arise out of a fair, honest-minded consideration of the evidence in the case, or from the lack of evidence. If after carefully considering and comparing all of the evidence in the case you are able to say upon your oaths as jurors that you have an abiding conviction to a moral certainty then you are satisfied beyond all reasonable doubt. If you are unable to say that you have such an abiding conviction, then you do entertain a reasonable doubt, and any such doubt should be resolved in favor of the defendant.

If you find from the evidence beyond all reasonable doubt that on the time and on the occasion referred to in the evidence that Martin was the agent or employee of the defendant Dukich, and that upon the time and occasion referred to in the evidence the bartender known as Martin had in his possession intoxicating liquors, that is, liquors suitable for beverage purposes and containing more than one-half of one per centum of alcohol by volume, and that the defendant Dukich knew of the possession of that liquor by his agent or employee, then you should find the defendant guilty of the offense [46] of the possession of intoxicating liquor. If you have a reasonable doubt as to the fact of his guilt having been established, or of the proof of any essential elements of the crime, you should resolve that doubt in his favor and find him not guilty.

If you find from the evidence beyond all reasonable doubt that the bartender known as Martin was the agent or employee of the defendant Dukich, and that he sold or delivered to Regan the intoxicating liquor referred to in the evidence, and that at the time of such transaction the defendant Dukich was present and aided, abetted, counseled, advised or participated in the transaction, your verdict should be guilty. If you entertain a reasonable doubt of his guilt having been established, under that charge, or as to the proof of any fact necessary to constitute his guilt, you must find him not guilty.

It will require the concurrence of the entire jury to return a verdict.

You are the sole and exclusive judges of the facts and of what weight and credit you will grant to the testimony of the several witnesses who have appeared before you and in that task you are at liberty to and should take into consideration the conduct and demeanor of the witnesses upon the witness-stand; you should take into consideration the intelligence or lack of intelligence manifested by the witnesses; the probability or improbability of the story told by the witnesses; the opportunity or lack of opportunity that the witness may have of knowing and being informed concerning the matters to which he testified; the apparent candor and frankness of the witness in testifying or the lack of those qualities, if any such appears; the interest that any witness might have in the outcome of the case, if any; anything disclosed from the witness-stand which, in your judgment, would cause him to color or warp his testimony one way or the other; in short, all of the facts and circumstances surrounding the witness indicated on the witness-stand, and in the light of all these give to the testimony of each witness that fair, reasonable weight and consideration which in your honest-minded judgment as practical men [47] it is reasonably and justly entitled to receive.

Have I omitted anything?

Mr. ROBERTSON.—I desire to reserve an exception to that portion of your Honor's instruc-

tions which said that if the man Martin had a pint of intoxicating liquor in his possession, that the defendant Dukich could be found guilty of such possession on the part of Martin. I do not remember the exact wording of the instruction, your Honor, but I desire an exception to that.

I desire to except to that portion of your Honor's instruction which further says if the defendant had in his employ a man named Martin, and that this man Martin sold intoxicating liquors in the defendant's presence, and the defendant counseled, aided, and so forth, that the defendant might be found guilty.

I desire to except to the latter part of your Honor's instructions, stating if the jury found from the evidence that the bartender had in his possession intoxicating liquors, and the defendant knew of its possession, that he would be found guilty.

And the further subsequent instruction with relation to the finding of the defendant guilty on sales by Martin.

The COURT.—All right.

(Thereupon the bailiffs were duly sworn to take charge of the jury.)

The COURT.—Gentlemen of the Jury, this case is now finally submitted to you. You may retire to your jury-room and consider of your verdict.
[48]

Certificate of Judge to Bill of Exceptions.

State of Washington,
County of Spokane,—ss.

I, J. STANLEY WEBSTER, United States District Judge for the Eastern District of Washington, and the Judge before whom the above-entitled action was tried, to wit: the cause entitled United States of America, plaintiff, vs. Joe Dukich, defendant, which is No. C.-4350 in said District Court, DO HEREBY CERTIFY, that the matters and proceedings embodied in the foregoing bill of exceptions are matters and proceedings occurring in said cause and the same are hereby made a part of the record therein; and that the above and foregoing bill of exceptions contains all the material facts, matters and proceedings heretofore occurring in said cause and not already a part of the record therein; and contains all the evidence, oral and in writing therein, and that the above and foregoing bill of exceptions was duly and regularly filed with the Clerk of the said Court and thereafter duly and regularly served within the time authorized by law; and that no amendments were proposed to said bill of exceptions excepting such as are embodied therein; that due and regular written notice of application to the Court for settlement and certifying said bill of exceptions was made and served upon the plaintiff, which notice specified the place and time (not less than three days nor more than ten days after the service of

said notice) to settle and certify said bill of exceptions.

Dated at Spokane, Washington, this 14th day of November, 1923.

J. STANLEY WEBSTER,
Judge. [49]

In the District Court of the United States for the Eastern District of Washington, Northern Division. United States of America, Plaintiff, vs. Joe Dukich, Defendant. Bill of Exceptions. Filed in the U. S. District Court, Eastern Dist. of Washington. Nov. 13, 1923. Alan G. Paine, Clerk. By Eva M. Hardin, Deputy.

[Endorsed]: No. 4149. United States Circuit Court of Appeals for the Ninth Circuit. Joe Dukich, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Received November 19, 1923.

F. D. MONCKTON,
Clerk.

Filed November 26, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States
Circuit Court of Appeals
for the Ninth Circuit

JOE DUKICH,

Plaintiff in Error,

vs.

THE UNITED STATES OF
AMERICA,

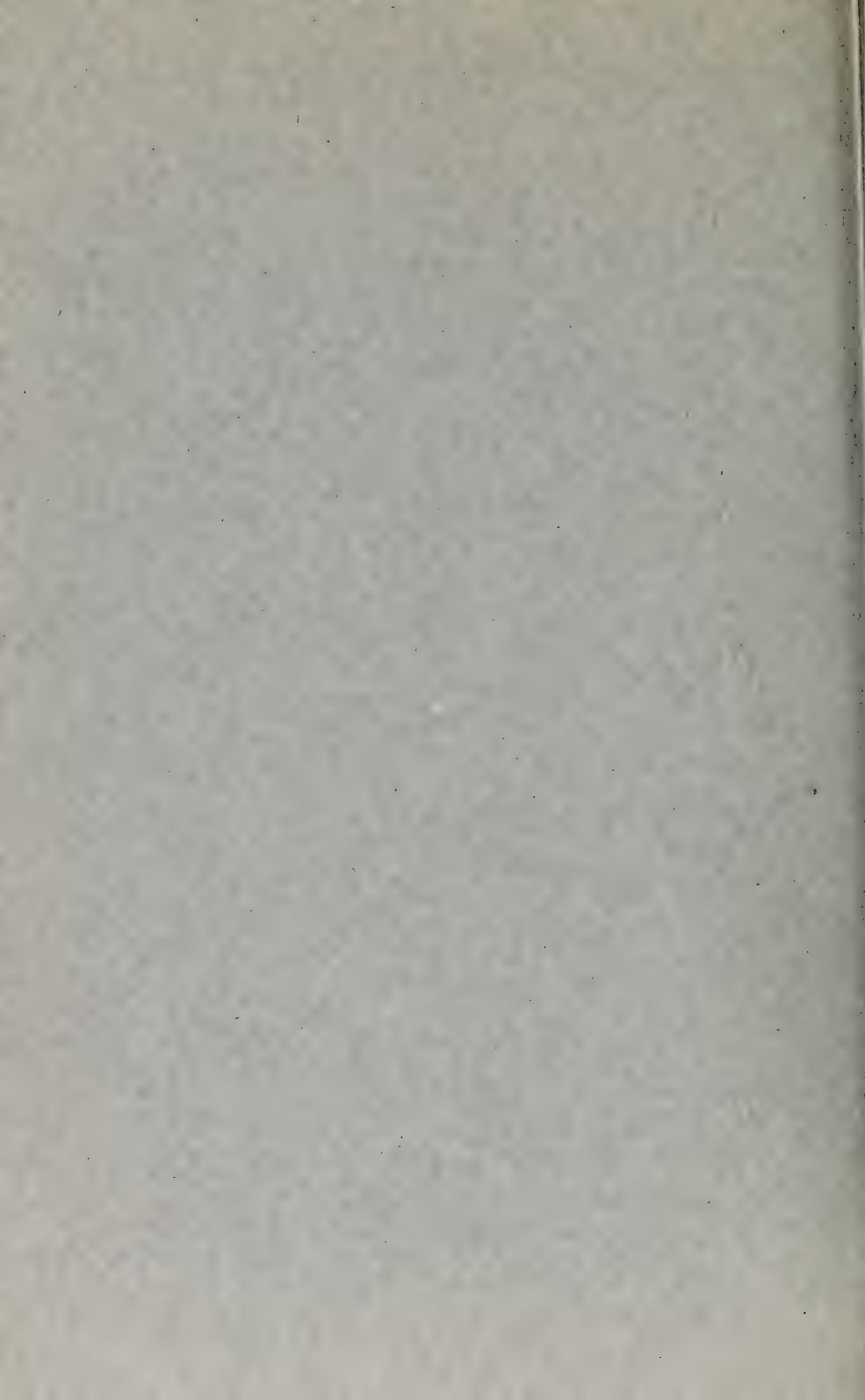
Defendant in Error.

No. 4149

BRIEF OF PLAINTIFF IN ERROR.

E. W. ROBERTSON,
405 Hyde Bldg.,
Spokane, Washington,
Attorney for Plaintiff in Error.

Filed _____ Clerk.



In the United States
Circuit Court of Appeals
for the Ninth Circuit

JOE DUKICH,

Plaintiff in Error,

vs.

THE UNITED STATES OF
AMERICA,

Defendant in Error.

No. 4149

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The defendant Joe Dukich was charged by information, in two counts, with violations of the National Prohibition Act. The first count charged defendant with the possession of about one pint of intoxicating liquor, on October 10, 1923; and the second count charged him with selling on the same day a quantity of spiritous liquor to one Leonard Regan. He was found guilty by the jury on both counts, and sentenced to pay a fine of \$500 and to serve six months in the county jail.

Both counts charged the defendant directly, no person being charged jointly with him, and it not being charged that he acted by or through the agency of another person.

The testimony of the Government was by two federal prohibition agents, Regan and Edholm. Regan testified that he went to the soft drink place of the defendant at about 10 P. M. October 9th, with Edholm and a man whom they had "picked up" on the street; that the man spoke to the defendant, who followed them in, and that the bartender served them two drinks.

An objection was made to this testimony upon the ground that it was a variance from the allegations in the information; that it was not alleged therein that the defendant acted through the agency of another, and no notice was given him of the nature of the accusation against him. This objection was overruled by the court, with the privilege of renewing it at the close of the case (pp. 36-37). It was so renewed by motions to strike and was overruled, and exception taken (pp. 38-49-50).

The witness proceeded in his testimony to relate that the bartender served the witness, Edholm and the man accompanying them three drinks, for which Regan paid, the bartender ringing the money up in the till.

Further, that he (Regan) and Edholm came back on July 10, the defendant being behind the cigar counter, and that the bartender served the witness two drinks of moonshine, the money paid therefor being rung up by him in the cash register (p. 37).

They returned at 10 P. M. and purchased a drink of moonshine whiskey from the bartender, whose name was Martin, and asked him for a pint of liquor. He sent a man to the rear to get it, and when the man was gone Edholm bought a drink of moonshine whiskey from the bartender. The man came back, handed the bottle to the bartender, who gave it to Regan. Regan paid him, the money being rung up in the till.

An objection to the admission of the bottle on the previously stated grounds that no agency or relationship was charged in the information, and that the evidence constituted a variance was overruled by the court.

On cross-examination the witness stated that when he went in the first time he did not ask defendant for a drink, the first thing said as to a drink being addressed to the bartender, the defendant being behind the cigar counter. (R. 42). On the second visit the defendant was talking to some foreigners, and the only thing said as between them

was "Hello." The third time the same thing took place.

So that the testimony of Regan shows no participation by the defendant in the act of selling liquor to them or even knowledge on his part that they had made purchases from the bartender.

On cross-examination of Edholm the same is true and as he locates the bartender as about the middle of the bar, and the defendant as behind the cigar counter, estimating the bar to be twenty feet and the cigar counter seven or ten feet.

The situation then is that the information charged the defendant with possession of a pint of liquor and with the sale of intoxicating liquor, and all that was shown were acts upon the part of the bartender in his place, and no participation of the defendant in such acts, or even a showing that he knew of the particular sales being made by the bartender to the witness Regan.

SPECIFICATIONS OF ERROR.

I.

The court erred in overruling the demurrer to Count 1 of the information.

II.

That the court erred in refusing to strike the evi-

dence relating to the sales of intoxicating liquor by one Martin for the reason that the information charged a sale by the defendant and did not name or otherwise refer to the said Martin, and such evidence constituted a fatal variance from the information, and the information did not apprise defendant of the nature and cause of the accusation against him. (Assignment of Error IV, pp. 21-22.)

III.

That the court erred in denying the motion to strike the evidence relating to the possession of a pint of moonshine whiskey by the said Martin, or others, for the reason that the information charged possession by the defendant and did not refer to the said Martin or others, and that this evidence constituted a fatal variance from the information, and the information did not inform defendant of the nature and cause of the accusation against him. (Assignment of Error V, p. 22.)

IV.

The court erred in denying the motion of the defendant for a directed verdict of not guilty as to the first count of the information.

V.

The court erred in instructing the jury as follows:

“* * * and in this case I instruct you that if you find from the evidence that upon the occasion in question the bartender referred to by the name of Martin was the agent or the employee of the defendant Dukich, and that that man, with the knowledge of Mr. Dukich, had in his possession at that place the intoxicating liquor in question, that, in law, would amount to the possession of Mr. Dukich.”

VI.

The court erred in instructing the jury as follows:

“* * * In this connection I further instruct you that if you find that at the time and upon the occasion in question the defendant had in his employ as his agent the man referred to as the bartender and called Martin, and that the sale of this liquor was made by Martin, and you further find it was made in the presence of the defendant Dukich, and that he aided, abetted, counseled, commanded, induced or procured the bartender known as Martin so to sell the liquor, that in law would constitute Mr. Dukich a principal in that transaction and he would be equally guilty with the man Martin who actually carried on and conducted the sale.”

VII.

The court erred in instructing the jury as follows:

“If you find from the evidence beyond all reasonable doubt that at the time and on the occasion referred to in the evidence that Martin was the agent or employee of the de-

fendant Dukich, and that upon the time and occasion referred to in the evidence the bartender known as Martin had in his possession intoxicating liquors, that is, liquors suitable for beverage purposes and containing more than one-half of one per centum of alcohol by volume, and that the defendant Dukich knew of the possession of that liquor by his agent or employe, then you should find the defendant guilty of the offense of the possession of intoxicating liquor."

VIII.

The court erred in instructing the jury as follows:

"If you find from the evidence beyond all reasonable doubt that the bartender known as Martin was the agent or employee of the defendant Dukich, and that he sold or delivered to Regan the intoxicating liquor referred to in the evidence, and that at the time of such transaction the defendant Dukich was present and aided, abetted, counseled, advised or participated in the transaction, your verdict should be guilty."

IX.

That the court erred in denying the motion of defendant in arrest of judgment.

X.

That the court erred in denying defendant's petition to set aside the verdict and for a new trial.

ARGUMENT AND AUTHORITIES.

*The Court Erred in Overruling the Demurrer to
Count 1. (Specification I.)*

Count 1 of the information charges that the defendant:

“* * * On or about the 10th day of July, 1923, in the said county of Spokane, in the Northern Division of the Eastern District of Washington, and within the jurisdiction of this court, did then and there knowingly, wilfully and unlawfully have and possess certain intoxicating liquor, to-wit: about one (1) pint of a certain spiritous liquor then and there containing more than one-half of one per centum of alcohol by volume and then and there being fit for beverage purposes, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.”

The demurrer to this count should have been sustained for the reason that it fails to allege any facts to show that the possession was unlawful. It is not unlawful under Sec. 3 of the National Prohibition Act to possess liquors in one's private dwelling for use of the owner and his guests. Here the place where the defendant possessed the liquor is not stated, nor is the purpose for which he possessed it alleged.

In *U. S. v. Cleveland*, 281 F. 249, the court in considering a similar count said, on p. 252:

“We find here an express recognition of the right to have and consume liquors in one’s home. Notice that in the two sections forbidding the possession of liquors the language is qualified. In Section 3, ‘Or possess any intoxicating liquor except as authorized in this act’; while in Section 33 it is, ‘The possession of liquors by any person not legally authorized * * * shall be *prima facie* evidence,’ etc.

‘So the possession of liquors in the home is both ‘authorized’ and ‘permitted’ by the act, and so is its use there as an intoxicating beverage’ for Section 33 says:

“ ‘Provided such liquors are for use only for the personal consumption of the owner thereof and his family,’ etc.

“In the face of this provision is it sufficient to allege the indictment, as here, merely the possession of the liquor by defendant and his intended use thereof as a beverage?”

The court then goes on to construe Section 32, providing that the indictment need not contain defensive negative averments, saying that this section goes on to provide:

“ ‘But it shall be sufficient to state that the act complained of was *then and there* prohibited and unlawful.’ ”

Says the Court:

“What was meant by ‘then and there,’ unless it was the time and place when the liquor was possessed by defendant? Must not the indictment then state this time and place? If so, this would not be a negative or defensive averment, but a positive one. As long as the act recognizes the right of possession and use at

certain places, and makes such possession illegal only at other places, then an indictment, to be sufficient, should state a time and place where the possession was illegal."

In *U. S. v. Illig*, 288 F. 949, the court on page 945 said:

"The various counts of the information are also defective in failing to set forth the ingredients of which the several offenses are composed, the several elements that enter into them, that the defendant may be informed of the precise offense which he is called upon to meet, and be enabled to subsequently interpose a plea of former acquittal or conviction. In most of the counts, which I will not stop to severally consider, the averments are merely conclusions of the pleader rather than averments of fact constituting a violation of the federal statute.

"As an example: The first count charges that the defendant 'did wilfully and unlawfully have and possess a large quantity (stating the amount) of intoxicating liquor without being authorized so to do in the manner provided by the National Prohibition Act.' The count could scarcely be drawn more barren of facts. Nothing is averred as to the character of the defendant's business, where the liquors were found or possessed, the purpose of their possession, or in what way the possession was unlawful. The pleader wholly ignores the fact that possession of intoxicating liquors is not made an offense under the Eighteenth Amendment; that Congress did not make the mere possession, stripped of every other fact, a crime. Possession can be made an offense only when prohibited for the purpose of making effective that which the amendment prohibits. But Congress cannot do so for the purpose of adding a prohibited act to those prescribed in

the fundamental law. *Hilt et al. v. U. S.* (C. C. A.), 279 Fed. 421; *U. S. v. Beiner* (D. C.), 275 Fed. 704; *U. S. v. Dowling* (D. C.), 278 Fed. 636; *Street v. Lincoln Safe Deposit Co.*, 254 U. S. 88, 41 Sup. Ct. 31, 65 L. Ed. 151, 10 A. L. R. 1548."

In *U. S. v. Boasberg*, 283 F. 305, the court on page 212 said:

"This leaves counts 4 and 5 of the second indictment to be considered. While the National Prohibition Act makes possession of intoxicating liquor for beverage purposes generally unlawful, Section 33 of title 2 of the act contains the proviso that it shall not be unlawful to possess liquors in one's private dwelling for the use of himself, his family and bona fide guests.

"The said two counts do not negative this proviso in any way. It is not enough to say this is a matter of defense to be raised by the defendant. Unless the exception is negatived, or the allegations of the indictment clearly show the liquor to be possessed at a place not the defendant's residence, no offense is charged. *U. S. v. Cook*, 17 Wall. 168, 21 L. Ed. 538."

In *Boasberg v. United States*, 279 F. 421, the Circuit Court of Appeals for the Fifth Circuit said, page 422:

"Neither of the counts mentioned states any fact or facts showing that the alleged possession was accompanied by such a purpose or intent, or was under such circumstances as to render it a violation of any law. The facts averred are consistent with the alleged possession of intoxicating liquors being a legally permitted one. The averments do not show that

the conduct charged had the elements required to make it a crime against the United States.”

See also *U. S. v. Dowling*, 278 F. 630.

The above cases call attention to the rule laid down in *Keck v. U. S.*, 172 U. S. 434, 43 L. Ed. 505, that the words “contrary to law,” “unlawful,” etc., add nothing to an indictment. There Chief Justice White said:

“It was charged in the count that Keck, on the date named, ‘did knowingly, wilfully and unlawfully import and bring into the United States, and did assist in importing and bringing into the United States, to-wit., into the port of Philadelphia,’ contrary to law and to the provisions of the act of Congress in such a case made and provided, with intent to defraud the United States.’ ”

“As is apparent, the alleged offense averred in this count was charged substantially in the words of the statute. In the argument at bar counsel for the United States conceded the vagueness of the accusation thus made; and, tested by the principles laid down in *United States v. Carll*, 105 U. S. 611, 612 (26:1135); *United States v. Hesse*, 124 U. S. 483 (31:516); and *Evans v. United States*, 153 U. S. 584, 587 (38:830, 832), the count was clearly insufficient. The allegations of the count were obviously too general, and did not sufficiently inform the defendant of the nature of the accusation against him. The words, “contrary to law,” contained in the statute clearly relate to legal provisions not found in Section 3082 itself, but we look in vain in the count for any indication of what was relied on as violative of the statutory regulations concerning the

importation of merchandise. The general expression, 'import and bring into the United States,' did not convey the necessary information, because importing merchandise is not *per se* contrary to law, and could only become so when done in violation of specific statutory requirements. As said in the Hess Case, at page 486 (31:517):

" 'The statute upon which the indictment is founded only described the general nature of the offense prohibited, and the indictment, in repeating its language without averments disclosing the particulars of the alleged offense, state no matters upon which jury could be formed for submission to a jury.' "

The Court Erred in Refusing to Strike Testimony Relating to Possession and Sales of Liquor by the Bartender Martin. (Specifications of Error IV and V.)

The information charging defendant directly with the possession and sale of intoxicating liquor, timely objections were made to the introduction of evidence to show possession and sale by the bartender. These objections were overruled with the privilege of renewing them at the close of the Government's case, which was done by motions to strike. Exceptions were also taken to the instructions of the court allowing the jury to find the defendant guilty of possession and sale by Martin.

The ruling of the court was based upon the decision of the Circuit Court of Appeals for the Ninth Circuit, in *Rosencranz v. United States*, 155 Fed.

38. There the plaintiff was indicted for the crime of keeping a bawdy house. The indictment described the particular apartment where it was alleged he kept the bawdy house. The evidence showed that the plaintiff in error owned the premises and received the rental therefor from a woman who used the place for purposes of prostitution. The court held that under the Alaska Penal Code, providing that all persons concerned in the commission of a crime shall be principals and that they should be tried and punished as such, that under this information the plaintiff in error could be convicted on evidence which went to show that he owned the premises and received the rental from a woman who used the place for purposes of prostitution. The fundamental difference between that case and this is that the plaintiff in error was there informed of the particular crime with which he was charged. He was given a description of the particular premises and charged with keeping them for the purpose of prostitution. He therefore had notice that he would be called upon to meet and defend the conduct of the particular premises and his connection therewith. In the instant case, however, the defendant was charged with the possession of liquor at no particular place, and with the sale of it at no particular place. He was charged with possessing liquor himself and selling liquor himself. Neither

by direct allegation nor by inference from other facts alleged was he in anywise apprised of the fact that he would be called upon to answer, not for a sale made by himself, but for sales made by another. He was therefore not "informed of the nature and cause of the accusation." This right, guaranteed to him by the sixth amendment of the Constitution, cannot be taken away by a statute abolishing the distinction between principals and accessories.

In *Davey v. U. S.* 208 Fed 237 (Circuit Court of Appeals, Seventh Circuit), the plaintiff in error was charged in the count with corruptly endeavoring to influence a witness, and in another count with aiding and abetting another person to bribe the same witness. He was found not guilty of the first count and guilty of the second. On page 241 the court said:

"The principal contention of the plaintiff in error is that the verdict is inconsistent with itself; that Davey was acquitted as principal in a misdemeanor and therefore cannot be found guilty as an accessory because by section 322 the accessory was made a principal.

"At common law there was no such offense as aiding and abetting a misdemeanor. Congress, in section 322, created a new crime and provided in effect that an accessory to an offense against the government should be punished as a principal. The fact that the statute provided that whoever directly commits an offense, and also whoever aids and abets the

commission of the offense, are both principals and punishable as such does not relieve the government from charging the facts which make up the crime. Two distinct crimes are covered by section 135 and 322. In one the crime is doing something directly; in the other doing the same thing indirectly. It is clear that, in order to convict a man of doing something indirectly he must be so charged, although, if found guilty, his punishment may be that of a principal."

The section of the Criminal Code referred to is 332 rather than 322, and reads as follows:

"Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal."

The court on page 242 said:

"Section 322 of the Criminal Code, in declaring that whoever aids, abets, counsels, commands, induces or procures the commission of any act constituting an offense defined in any law of the United States is a principal merely defines the crime of aiding and abetting and provides in effect that one found guilty shall be punished as a principal would be punished."

And again on page 243:

"The crime of which plaintiff in error was found guilty was defined by section 322; the crime of which he was found not guilty was defined by section 135. The mere fact that the punishment for one who aids and abets is the same as that of a principal or that one who aids and abets may be charged as a principal

does not render the verdict inconsistent, because, in order to hold the accused under section 322, it was necessary for the grand jury to define what law was violated and the manner of that violation.

“Counsel for plaintiff in error say that the accused has been found guilty and not guilty of the same offense. The error in their reasoning lies in the assumption that the crime of doing a thing directly and the crime of aiding and abetting in a violation of the law is the same offense.”

In *Hollin v. Commonwealth*, 158 Ky. 427, 165 S. W. 407, the appellant was charged with murder, the charge being against him directly, whereas the evidence showed that he had aided and abetted another person in killing deceased, such other person neither being charged jointly nor mentioned in the indictment. The court held that it was error to instruct the jury that the defendant could be found guilty if he was present and wilfully aided and abetted in the killing.

Mulligan v. Commonwealth, 84 Ky. 229, 1 S. W. 417, was quoted from with approval. There Mulligan had been indicted alone for rape and the trial court had instructed the jury that he was guilty if he aided and abetted others in detaining the woman against her will.

Sustaining the contention that this was error, the Supreme Court of Kentucky said:

“ ‘The object of the indictment is to make known to the accused with what particular crime he is charged, and that the commonwealth will attempt to prove it as charged. So to indict both the principal and aider and abettor as principals, they are notified that the commonwealth can and will attempt to prove, in order to make out their crime, that one did the principal act and the other aided and abetted, and may prepare their defense accordingly. Or if the commonwealth does not choose to indict the principal in the first degree, or for any reason cannot do so, but wishes to indict the aider, and will set forth in the indictment the name of the principal, together with his acts or participation in the crime, then it can be said that defendant is given a statement of the acts constituting the offense charged against him. On the other hand, to indict him as the only perpetrator of the crime, and then on the trial be permitted to prove that he was not guilty of the crime as charged—the actual perpetrator of it—but that someone else was guilty, not named in the indictment, and thus secure a conviction, would certainly violate the rule.’ In concluding the opinion upon this point the court further said: “We conclude, therefore: First, that the commonwealth may, if it chooses, indict both principal and aider and abettor jointly as principals, and secure a conviction against both without violating the rule of the Code *supra*, because they are then furnished with a statement of the facts constituting their crime; or, second, the aider and abettor may be indicted alone; but in that case he ought to be furnished with a statement of the acts constituting the crime. This can only be done by setting out in the indictment the acts of the principal actor. By this course the commonwealth cannot be wronged, and the defendant cannot be taken unawares or by surprise, be-

cause the commonwealth has informed him by a full statement of the facts of which he is charged.' ”

Nearly all of the decisions holding that a defendant can be indicted as a principal and convicted on evidence showing him to be an accessory are in cases where the accessory is charged jointly with the principal, or where the state of facts are such as to carry by necessary inference notice to the defendant of the particular situation which he will be called to meet at the trial. He is given such notice where, as in the *Rosencranz* case, he is charged with maintaining a particular place or establishment for a particular purpose. He is not given it when he is charged with a particular act such as the sale of an unspecified quantity of liquor with no specifications as to where the sale was made and no statement of the circumstances connected with the sale, and when it is intended to claim upon the trial that he did not actually conduct the sale himself but that he is responsible for the act of another person whose name was known to the District Attorney but not alleged in the information. Especially is this situation violative of the constitutional right of a defendant where, as in this case, the operatives conceal their identity and no arrests are made until a long time subsequent to the time when it is claimed the transaction took place.

No statute abolishing the distinction between a principal and accessory can operate to deprive a defendant of the right to be informed of the nature and cause of the accusation against him. The real inquiry is, in every case, not whether a defendant is informed against in a technical sense as a principal or as an accessory, but whether in the particular case he is given notice by information or indictment of the situation which will confront him upon the trial.

It is respectfully urged that the defendant in this case was given no notice in the information against him that he would be called upon to answer for the acts of Martin. He had every reason to believe that, being charged as the principal and only actor, he would not be called upon to defend as against the acts of another person, and his connection with such other person.

The Court Erred in Instructions as to the Possession by the Bartender Martin. (Specifications of Error V and VII.)

Specification V relates to the following instruction given by the court to the jury and assigned as error:

“* * * and in this case I instruct you that if you find from the evidence that upon the occasion in question the bartender referred to by the name of Martin was the agent or the

employee of the defendant Dukich, and that man, with the knowledge of Mr. Dukich, had in his possession at that place the intoxicating liquor in question, that, in law, would amount to the possession of Mr. Dukich."

Specification VI relates to the following instruction given by the court to the jury and assigned as error:

"If you find from the evidence beyond all reasonable doubt that at the time and on the occasion referred to in the evidence that Martin was the agent or employee of the defendant Dukich, and that upon the time and occasion referred to in the evidence the bartender known as Martin had in his possession intoxicating liquors, that is, liquors suitable for beverage purposes and containing more than one-half of one per centum of alcohol by volume, and that the defendant Dukich knew of the possession of that liquor by his agent or employee, then you should find the defendant guilty of the offense of the possession of intoxicating liquor."

Even if the contention with respect to the admissibility of the evidence showing possession by Martin be not well taken, yet it is obvious that the above quoted instructions do not contain a correct rule of law. The first presents the proposition that if Martin was the agent or employee of the defendant Dukich and with the knowledge of Dukich had in his possession in the place intoxicating liquor, that this would be the possession of Dukich. If this be a correct rule of law, then the employer of a clerk

in a store or office who has in his possession intoxicating liquor in the store or office is guilty from the mere fact of knowledge on his part that the clerk has such liquor in his possession.

But the second quoted instruction goes to an even greater length than the first. There the only thing necessary to fasten guilt upon the employer is that the employer shall have knowledge that his employee had in his possession intoxicating liquor. Whether the liquor was possessed for the uses or purposes of the employer or was authorized or even consented to by the employer is not defined as a necessary element by either instruction.

The Court Erred in Instructing the Jury that Sales of Intoxicating Liquor by the Bartender Martin Would Justify the Conviction of Dukich.

(Specifications of Error VI and VIII.)

Specification VI relates to the following instruction, excepted to by the defendant and assigned as error:

“* * * In this connection I further instruct you that if you find that at the time and upon the occasion in question the defendant had in his employ as his agent the man referred to as the bartender and called Martin, and that the sale of this liquor was made by Martin, and you further find it was made in the presence of the defendant Dukich, and that he aided, abetted, counseled, commanded, induced or procured the bartender known as

Martin so to sell the liquor, that in law would constitute Mr. Dukich a principal in that transaction and he would be equally guilty with the man Martin who actually carried on and conducted the sale."

Specification VIII relates to the following instruction given by the court to the jury and assigned as error:

"If you find from the evidence beyond all reasonable doubt that the bartender known as Martin was the agent or employee of the defendant Dukich, and that he sold or delivered to Regan the intoxicating liquor referred to in the evidence, and that at the time of such transaction the defendant Dukich was present and aided, abetted, counseled, advised or participated in the transaction, your verdict should be guilty."

Not only are these instructions erroneous in charging that the defendant Dukich can be found guilty for the acts of Martin, but they are also erroneous in that they contain assumptions of fact derogatory to the defendant. The first quoted instruction contains the phrase "and that the sale of *this liquor* was made by Martin," and the further phrase "so to sell *the liquor*," and the further phrase "*he would be equally guilty with the man Martin who actually carried on and conducted the sale.*"

The second quoted instruction contains a phrase "and that he sold or delivered to Regan *the intoxicating liquor referred to in the evidence.*" Thus it

is assumed in the above quoted instruction that the liquid referred to in the evidence was intoxicating liquor and that Martin was guilty of selling it.

While federal judges may comment upon the evidence and express their opinion upon the same with proper limitations, it has been held that they may not in charging juries assume any necessary element of the defendant's guilt as an established fact, and this has been held even in cases where the evidence against the defendant is clear and uncontradicted.

In *Konda v. The U. S.*, 166 Fed. 91 (Circuit Court of Appeals, Seventh Circuit), the trial court charged the jury as a matter of law that a certain document was non-mailable. On page 93 the court said:

"In our judgment, however, a defendant in a criminal case has the absolute right to require that the jury decide whether or not the evidence sustains each and every material allegation of the indictment. Material allegations are allegations of fact. And each, as much as any other, enters into a verdict of guilty. If the judge may decide that one or another material allegation is proven, he may decide that all are proven, and so direct a verdict of guilty. In a civil case the judge may exercise the power of directing a verdict for the plaintiff when there is no conflict in the evidence and the only inference that can be drawn by reasonable minds as to the ultimate facts in issue favors the plaintiff. This

power, we opine, grew out of the practical administration of the fundamental power to review, on a motion for a new trial, the findings of the jury. In the civil case above supposed, if the jury should return a verdict for the defendant, the judge would set it aside; and he would continue to set aside verdicts in that case until one should be returned that was in accord with the undisputed facts. So he cuts off the possibility of useless verdicts by directing in the first instance the jury to return the only verdict he will let stand. But in a criminal case, if the jury return a verdict for the defendant the judge, no matter how contrary to the evidence he may think the verdict is, cannot set it aside and order a new trial. Therefore, since the judge is without power to review and overturn a verdict of not guilty, there is no basis on which to claim the power to direct a verdict of guilty. Our conclusion is that an accused person has the same right to have 12 laymen pronounce upon the truth or falsity of each material averment in the indictment, if the evidence against him is clear and uncontradicted, as he unquestionably would have if it were doubtful and conflicting. Inasmuch as jurors are rightly trusted, in close and difficult cases, to maintain the peace and dignity of organized society, surely they may be relied on in the plain and simple ones."

Dolan v. U. S., 123 Fed. 52.

Hicks v. U. S., 14 S. C. R. 144, 37 L. Ed. 1137.

It is respectfully urged that Count 1 of the information was insufficient in the particulars set forth herein; that neither count of the information justified the evidence admitted in support thereof; that

the motion to strike such evidence should have been granted; that the instructions were erroneous, and that the motion in arrest of judgment or the petition for a new trial should be granted.

Respectfully submitted,

E. W. ROBERTSON,

Attorney for Plaintiff in Error.

IN THE
United States
Circuit Court of Appeals
For The Ninth Circuit

JOE DUKICH,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

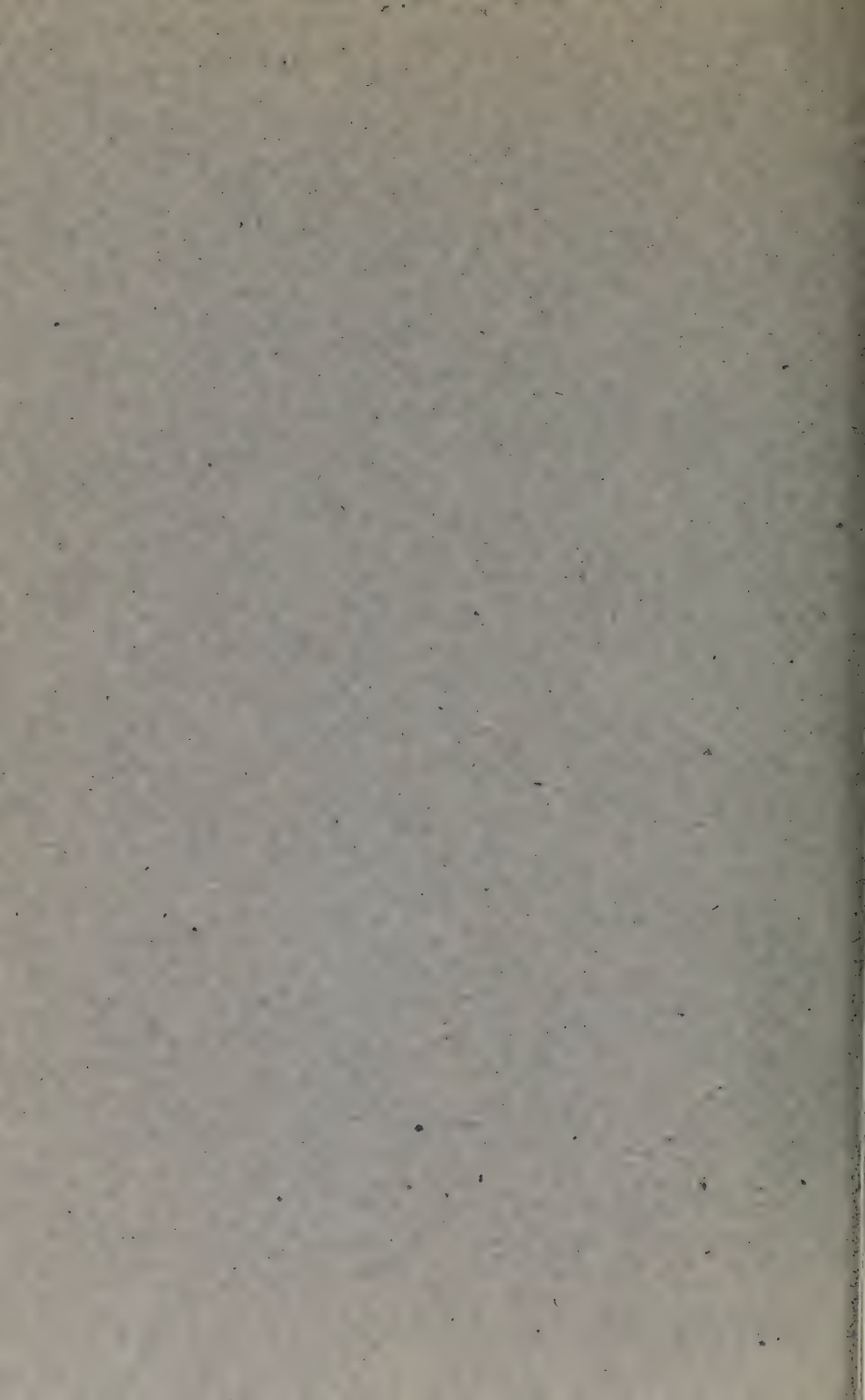
No. 4149

Brief of Defendant in Error

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IN THE
United States
Circuit Court of Appeals
For The Ninth Circuit

JOE DUKICH,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

No. 4149

Brief of Defendant in Error

The facts involved in this case have been stated with sufficient accuracy in the brief of plaintiff in error for the proper consideration of this case, and we will, therefore, refrain from further burdening the Court with a reiteration thereof.

Believing that it will be conducive to clearness we will follow the assignments of error in the order adopted by counsel in his opening brief on behalf of plaintiff in error.

ARGUMENT

I.

Thus commencing with assignments of error I, II, and III, counsel for plaintiff in error contends that the demurrer interposed to the information in the above action should have been sustained, supporting this position with the citation of the case of *United States v. Cleveland*, 281 Fed. 249. The words "then and there" seem to be of paramount importance in the consideration of this case, and in discussing the meaning of this expression, the Court says:

"Must not the indictment then state its time and place."

We contend, after perusal of this decision, that the Court has a misconception of this phrase, and while we concede that the word "then" refers to the time of commission of the offense, the word "there" only involves and has reference to the question of venue and jurisdiction by the District Court of the crime.

The phrase in question has its origin in the common law and it has not yet been decided that the use of these words would enlarge or add force to the sufficiency of the charge as they are made use of merely to establish that the prohibited act occurred within the jurisdiction and venue of the court. Further, if the words were entirely omitted, such omission would not result in a fatal defect as they would necessarily be supplied by implication. In support of the contention of plaintiff in error counsel quotes at length in his brief from the *Cleveland* case, *supra*, and we submit that the issue there raised was

fully discussed and disposed of contrary to such contention by the case of *Singleton vs. United States*, 290 Fed. 130, and we believe that further argument is unnecessary.

Following the citations contained in plaintiff's brief, we find much reliance placed upon the decision in *United States vs. Illig*, 288 Fed. 939, which involves the construction of Section 32, Title II of the National Prohibition Act. We contend that a false premise is assumed by the court, when it states, p. 932: "It is not to be assumed that this section was intended as a radical departure from the well settled principles governing criminal pleading and procedure."

Section 32, Title II, of the Prohibition Act is as follows:

"In any affidavit, information or indictment for the violation of this act, separate offenses may be united in separate counts and the defendant may be tried on all at one trial and the penalty for all offenses may be imposed. It shall not be necessary in any affidavit, information or indictment to give the name of the purchaser or to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful, but this provision shall not be construed to preclude the trial court from directing the furnishing the defendant a bill of particulars when it deems it proper to do so."

We submit that the province to change a rule of code pleading is within the Congress of the United States and that such right can not be questioned, and it clearly appears from the section above quoted that it was the definite purpose of congress to indicate the necessary

allegations to properly state an offense under that act. We contend that it can not be declared that the limit of the legislative power of Congress has been transcended by the enactment of said section, and that such is the universal interpretation given the statute by the courts. In contradistinction of the holding in the Illig case, the attention of the court is directed to the case of Davis vs. United States, 274 Fed. 928, from the Ninth Circuit. In this case the form of the indictment is also challenged on the grounds that the statute under discussion "contains an exception or proviso in its enacting clause which is so incorporated with the language describing and defining the offense, that the ingredients of the offense can not be accurately and clearly described if the exception is omitted. It must be shown that the accused is not within the exception."

It is the contention of the government that the language of Section 3, defining the offense, is entirely separable from the exception, and that the elements constituting the offense may be clearly stated without reference to the exception; and, therefore, such reference may be omitted with safety, as the exception clearly contains matters of defense. Section 3 of the said National Prohibition Act, reads as follows:

"No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor, except as authorized by this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

In the case of *Massey vs. United States* 281 Fed. 293, a demurrer was interposed to the information, which was similar to the one in the instant case. The Circuit Court of Appeals there held that under the terms of Section 3 of said Act, the allegations that the possession was unlawful, was a sufficient statement of the charge of unlawful possession, and a negation of the purpose for which the accused might have possessed it was unnecessary.

Counsel for plaintiff in error cites and relies upon the case of *United States vs. Boasberg*, 283 Fed. 305, to sustain his contention. But we submit that the weight of authority is against the theory of counsel in view of the decisions in the following cases:

Panzech v. United States, 285 Fed. 871;
Fassela vs. United States, 285 Fed. 378;
Rose vs. United States, 274 Fed. 245;
Hensberg vs. United States, 288 Fed. 370;
Cabiale vs. United States, 276 Fed. 769;
Slack vs. State (Tex.), 136 S. W. 1073.

Also see 22 Cyc., pages 344, 345 and 346, where the rule relative to exceptions is clearly expressed.

In the case of *United States vs. Nelson*, 29 Fed. 202, the principles as to negation of exceptions are stated in the following language:

“When the enacting clause of a statute describes the offense with certain exceptions, it is necessary to state all the circumstances that constitute the offense and to negative the exception; *but if the exceptions are obtained in separate clauses of the statute, they may be omitted in the indictment and*

the defendant must show that his case comes within them to avail himself of their benefit." (Italics ours).

Considering this section of the Prohibition Act in connection with the decisions above cited to sustain the sufficiency of the information, is it not conclusive that the words "Any defensive, negative averments" apply to the possession of intoxicating liquor. What purpose would Section 32 serve, and what was the intent of congress in embodying it in this law, if it were not to make plain the elements to constitute an offense under this act, and to prescribe the necessary allegations to fully inform a defendant of the crime with which he is charged. To hold otherwise is to void and nullify the section in question and we can find no logical grounds upon which such a decision could be predicated: for, if the statute in question is to be given universal application and does not apply to a case of possession, then to what particular class of cases is it applicable?

2.

"The Court erred in refusing to strike testimony relating to possession and sales of liquor by the bartender Martin, Specifications of Error IV and V." (Number in record II and III.)

The second count of the information filed in this case charged the defendant Dukich directly as a principal under Section 332 of the Penal Code, which provides:

"Whoever directly commits any act constituting an offense defined in any law of the United States or aids, abets, counsels, commands, induces, or prescribes its commission, is a principal."

Counsel for plaintiff in error cites the case of Davey vs. United States, 208 Fed. 237, in support of his contention that the defendant in the instant case was deprived of the right accorded him under the Constitution that he should be informed of the nature or cause of the accusation against him, which right can not be taken from him by statute abolishing the distinction between principals and accessories. The government, on the other hand, urges that the averments in the second count of this information sufficiently state the crime and serve to put the defendant on notice of the offense of which he is accused. We submit that there is a want of merit in the suggestion urged by plaintiff in error that he has been deprived of any right accorded under the Constitution and we do not believe such position can be maintained in good faith by counsel for plaintiff in error.

The distinction between principals and accessories has been abrogated by the enactment of Section 332 of the Penal Code and the charge against Dukich as a principal informs him with sufficient certainty of the commission of the overt act and puts him on notice to meet the accusation. Because the courts have passed upon the issues involved in this specification, argument on the principle involved is unnecessary to point out the erroneous position taken by counsel and we will, therefore, content ourselves with the citation of the following cases which are in point:

Rosecranz v. U. S., 155 Fed. 38;

Rooney v. U. S., 203 Fed. 928;

Vane v. U. S., 254 Fed. 32;

Hunter v. U. S., 272 Fed. 235;

Wood v. U. S., 204 Fed. 55;

Ferry v. U. S., 292 Fed. 583;

Egan v. U. S., 287 Fed. 958;

Ruthenberg v. U. S., 245 U. S. 480;

Jin Fucy Moy v. U. S., 254 U. S. 189; and a quotation from the case of *Rooney v. U. S.*, 203 Fed. 928, from this circuit, which so ably states the law upon the question under discussion.

“This Section is partly taken from Sections 5323, and 5327 of the Revised Statutes (U. S. Comp. St. 1901, pp. 3619, 3670), but is enlarged and made of general application. In it there is no distinction made between misdemeanors and felonies, and it is applicable alike to both classes of offenses. The doctrine at common law was that as to misdemeanors all persons who aided and abetted, or who commanded, advised, or encouraged another to commit an offense, were principals, and could be indicted, tried, and convicted as such.”

3.

The Court erred in Instructions as to the possession by the bartender, Martin (Specifications of Error V and VII).

The Court erred in Instructing the Jury that Sales of Intoxicating Liquor by the bartender Martin would justify the conviction of Dukich (Specifications of Error VI and VIII).

Under these heads counsel complains of the following language in the Court's instructions:

“* * * * * and in this case I instruct you that if you find from the evidence that upon the occasion in question the bartender referred to by the name

of Martin was the agent or the employee of the defendant Dukich, and that man, with the knowledge of Mr. Dukich, had in his possession at that place the intoxicating liquor in question, that, in law, would amount to the possession of Mr. Dukich."

We contend that this instruction is a clear and correct enunciation of the law applicable to the question of agency, and the criminal liability of the master for the acts, and we quote from the case of Heitler vs. United States, 280 Fed. 703, in support of the Government's position:

"Where two or more parties join in an unlawful undertaking or enterprise, *there is no master and no servant*, but each is liable as principal in a criminal action to punishment for violation of the law. It does not matter whose hand gave out the whiskey, or who served it; it was a common undertaking, participated in by Heitler, and a part of which was a violation of the law as charged, and all are guilty."

In the case of Nobile vs. United States, 284 Fed. 255, the instruction there complained of is even broader than the one under discussion in the instant case, and the court said in passing upon the doctrine of liability of the employer:

"This is a correct exposition of the law and corrected the first statement. While the civil doctrine that a principal is bound by the acts of his agents within the scope of his employment, and authority to do a criminal act will not be presumed, yet if the defendant was the proprietor, stood by, saw the bartender sell intoxicating liquor, sent over liquor from 420 Grand Street to 500 to be sold, the jury was justified in concluding that the acts of Perazzo were done with defendant's authority and under his di-

rection, and for such he is criminally liable. Sec. 332 Criminal Code."

In a very late case, *Ferry vs. United States*, 292 Fed. 583, a similar state of facts was before the Court on writ of error from a conviction secured in the District Court, and was affirmed by the Circuit Court of Appeals for the Third Circuit.

"If you find from the evidence beyond all reasonable doubt that at the time and on the occasion referred to in the evidence the bartender known as Martin had in his possession intoxicating liquors, that is, liquors suitable for beverage purposes and containing more than one-half of one per centum of alcohol by volume, and that the defendant Dukich knew of the possession of that liquor by his agent or employee, then you should find the defendant guilty of the offense of the possession of intoxicating liquor."

" * * * * In this connection I further instruct you that if you find that at the time and upon the occasion in question the defendant had in his employ as his agent the man referred to as the bartender and called Martin, and that the sale of this liquor was made by Martin, and you further find it was made in the presence of the defendant Dukich, and that he aided, abetted, counselled, commanded, induced or procured the bartender known as Martin so to sell the liquor, that in law would constitute Mr. Dukich a principal in that transaction and he would be equally guilty with the man Martin who actually carried on and conducted the sale."

"If you find from the evidence beyond all reasonable doubt that the bartender known as Martin was the agent or employee of the defendant Dukich, and that he sold or delivered to Regan the intoxicating liquor referred to in the evidence, and that at the

time of such transaction the defendant Dukich was present and aided, abetted, counselled, advised or participated in the transaction, your verdict should be guilty.”

With reference to these Specifications, we do not believe that they possess sufficient merit to warrant further trespass upon the time and patience of the Court to enter into a discussion of the same, and we submit that there is no error therein contained and the law is correctly enunciated and applicable to the facts in this case established by the evidence. In support of this contention is the case of Hawkins vs. United States, 293 Fed. 586, to which we refer the Court.

We respectfully urge and submit that the charge in the information was sufficient to acquaint the plaintiff in error with the offense with which he was charged; that no error was committed by the Court in his instructions to the Jury and that the verdict returned by the Jury should be affirmed.

Respectfully submitted,

FRANK R. JEFFREY,

United States Attorney,

H. SYLVESTER GARVIN,

Assistant United States Attorney.

In the United States
Circuit Court of Appeals
for the Ninth Circuit

JOE DUKICH,

Plaintiff in Error,

vs.

No. 4149

THE UNITED STATES OF
AMERICA,

Defendant in Error.

PETITION FOR REHEARING.

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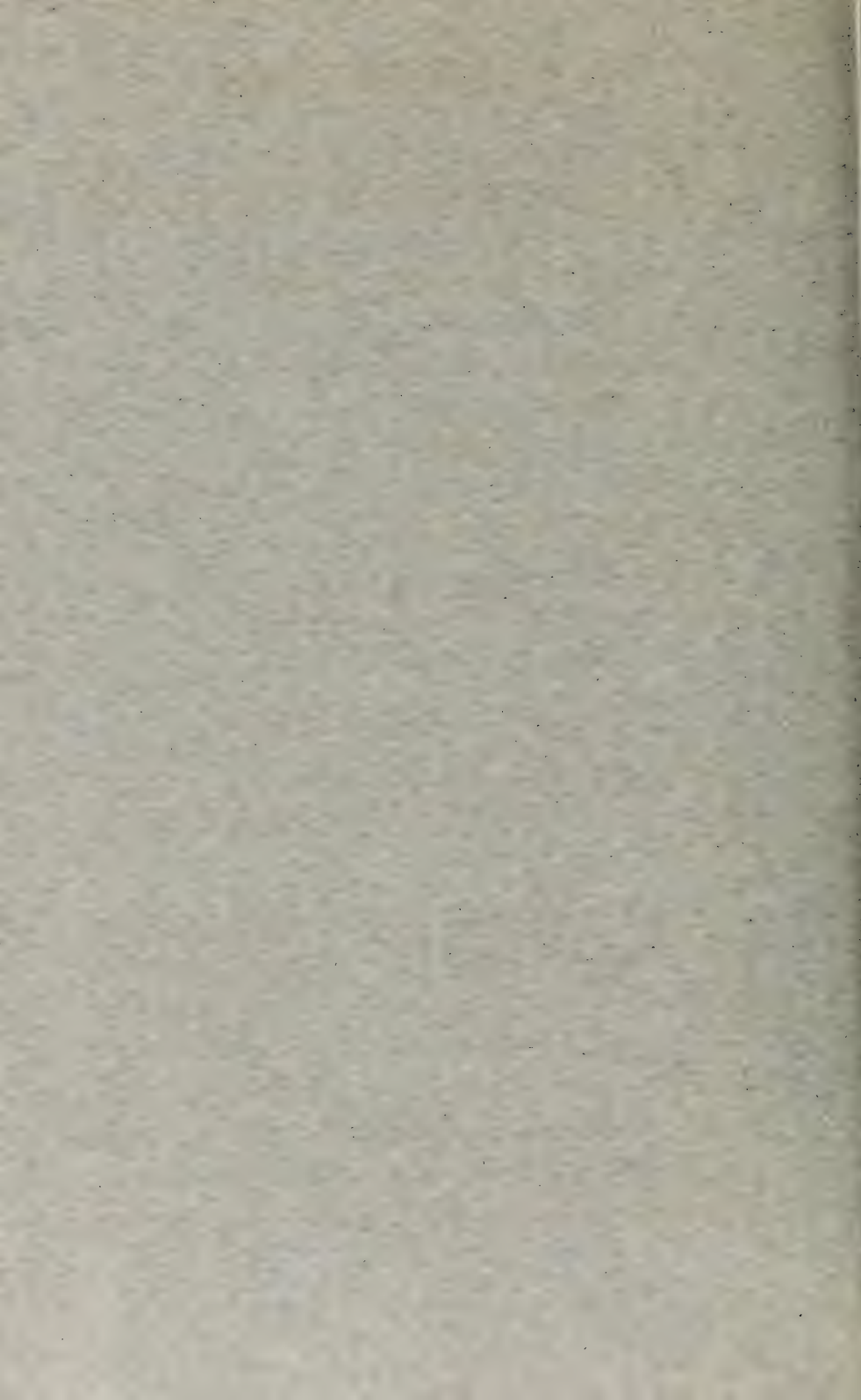
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In the United States
Circuit Court of Appeals
for the Ninth Circuit

JOE DUKICH,

Plaintiff in Error,

vs.

THE UNITED STATES OF
AMERICA,

Defendant in Error.

No. 4149

PETITION FOR REHEARING.

Comes now the plaintiff in error and petitions the court for a rehearing herein upon the following grounds:

The opinion holds that since by Section 332 of the Penal Code one who aids or abets the commission of an offense is a principal that he can be so charged without setting forth the evidentiary facts that make him legally a principal. In a strict legal sense it is undoubtedly correct that one who aids and abets in the commission of an offense, who is charged as a principal and who goes through a trial

without raising the objection that he had not been apprised of the nature and cause of the accusation against him, is precluded after a verdict from contending that there was a fatal variance between the charge and the proof. By permitting the introduction of evidence showing that he was acting through the agency of another without raising the objection that he was not apprised by the charge that he would be confronted with such evidence, he would undoubtedly waive the right to raise this objection after the rendition of a verdict. The contention, then, that there was a fatal variance between the information and the proof would be merely a technical one, which would not be tenable in view of Section 332 of the Criminal Code.

When the evidence was first presented which indicated that the defendant was to be charged with the act of another, an objection was made that he has not been apprised by the information that he would have to meet such testimony upon the trial, which objection was insisted upon at all stages of the proceedings. The question, then, became not whether there was a variance between the information and the proof in a strict legal sense, but whether the information sufficiently apprised the defendant of the charge against him so as to enable him to present his defense. That it did not do so must

be readily apparent to the court. The information led him to believe that the proof would show that he personally possessed and sold intoxicating liquor. The proof disclosed that he was sought to be held responsible for possession and sale by another party whose name was known and disclosed in the proof, but whose name was not stated in the information. Suppose the information in this cause had alleged that the defendant had made the sale by and through the agency of another person, would it have been sufficient had not the name of such other person been disclosed or an allegation made that the name of such other person was unknown? Yet such an information would have much more fully apprised the defendant of the charge against him and have enabled him to present his defense much better than if he had been led to believe that he would be held to answer for his own acts, whereas it was intended to charge him with the acts of another.

In *Simmons v. U. S.*, 24 L. Ed. 819, the information charged that the defendant "did knowingly and wilfully cause and procure to be used a still," etc. The court said (page 820):

"Where the offense is purely statutory, having no relation to the common law, it is, 'As a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any fur-

ther expansion of the matter.' 1 Bishop, Crim. Proc., Sec. 611, and authorities there cited.) But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute.

"Tested by these rules, the second count is insufficient. Since the defendant was not charged with using the still, boiler and other vessels himself, but only with causing and procuring some one else to use them, the name of that person should have been given. It was neither impracticable nor unreasonably difficult to have done so. If the name of such person was unknown to the grand jurors, that fact should have been stated in the indictment."

What difference can it make whether such a defect as above set forth be disclosed in the indictment or the proofs, provided that if it be in the latter a timely objection be made that the indictment did not properly apprise the defendant? If the defect be disclosed on the face of the indictment, it might well be argued that a bill of particulars would remedy it, whereas if it be hidden in a direct charge what remedy has a defendant, except by objection to the evidence which first discloses it?

If it be the law "that the accused must be apprised by the indictment with reasonable certainty

of the nature of the accusation against him, to the end that he may prepare his defense," what justification can be made of an information which charges him directly as a sole principal for the act of Martin, whose name was known to the District Attorney at the time the information was filed? Instead of the issue being the acts of the defendant himself in the main transactions charged, it became the acts of Martin therein and the relationship between the defendant and Martin. An entirely different character of proof was demanded in defense. The guilt of Martin was also in issue, and he was a material witness for the defense under the evidence, although not necessarily so under the charge.

While it may not be necessary to disclose all evidentiary facts in an information, yet sufficient should be alleged so that the defendant may know what issues he has to meet and what witnesses to produce.

The constitutional requirement that a man must be apprised of the nature and cause of the accusation against him is a matter of substance rather than form. The statute abolishing the technical distinctions between principals and accessories does not materially affect it. The statute merely does away with the requirement that an accessory shall be charged as such. There still remains the ques-

tion: Does the indictment sufficiently inform him so he can prepare his defense? If it does not it can make little difference whether he is charged as a principal or as an accessory.

In the two federal cases listed in the opinion, *Vane v. U. S.*, 254 Fed. 32; and *Rooney v. U. S.*, 203 Fed. 928, the defendant was charged jointly with others. Obviously each was apprised that all his acts in conjunction with the others, as well as their acts, would be matters which he would be required to meet.

It is respectfully submitted that the opinion should be modified to the extent of holding that under a charge of this character the objection to the evidence offered should have been sustained.

The opinion holds the instructions excepted to were without error, stating that they correctly incorporated the principle that a man may do a criminal act through the agency of another. It was contended in the brief that the parts of the instructions relating to sales by Martin contained assumptions of fact. These are quoted in Specifications of Error VI and VIII. They read as follows:

VI.

“* * * In this connection I further instruct you that if you find that at the time and

upon the occasion in question the defendant had in his employ as his agent the man referred to as the bartender and called Martin, *and that the sale of this liquor was made by Martin*, and you further find it was made in the presence of the defendant Dukich, and that he aided, abetted, counseled, commanded, induced or procured the bartender known as Martin *so to sell the liquor*, that in law would constitute Mr. Dukich a principal in that transaction *and he would be equally guilty with the man Martin who actually carried on and conducted the sale.*"

VIII.

"If you find from the evidence beyond all reasonable doubt that the bartender known as Martin was the agent or employee of the defendant Dukich, and that he sold or delivered to Regan *the intoxicating liquor referred to in the evidence*, and that at the time of such transaction the defendant Dukich was present and aided, abetted, counseled, advised or participated in the transaction, your verdict should be guilty."

It is contended that the italicized parts of the instructions assume facts to be established, and that this invaded the province of the jury. The first phrase, "and that the sale of this liquor was made by Martin," assumes that a sale of intoxicating liquor was made, "so to sell the liquor," is open to a similar objection. "And he would be equally guilty with the man Martin who actually carried on and conducted the sale," assumes that Martin did carry on and conduct a sale of intoxicating liquor.

The phrase, "the intoxicating liquor referred to in the evidence," assumes that not only was the contents of the bottle intoxicating liquor, but that the drinks referred to as having been purchased were likewise intoxicating liquor.

To assume a fact in an instruction is in effect to decide it, and where it is a necessary element to be shown in order to establish guilt, a defendant is deprived of his right to have it determined by a jury.

Konda v. U. S., 166 Fed. 91.

Dolan v. U. S., 123 Fed. 52.

Hicks v. U. S., 14 S. C. R. 144, 37 L. Ed. 1137.

It is respectfully submitted that a rehearing should be granted plaintiff in error.

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I hereby certify that in my judgment the above petition for rehearing is well founded and that it is not interposed for delay.

E. W. ROBERTSON,
Attorney for Plaintiff in Error.



